

# CALIFORNIA LITIGATION REVIEW

LITIGATION

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LITIGATION

2026 EDITION





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# ALTERNATIVE DISPUTE RESOLUTION UPDATE

Written by Paul J. Dubow\*



The number of ADR cases decided by the U.S. Supreme Court and the California appellate courts declined significantly in 2025, from 65 to 44 cases. There was little change in our two highest courts as the U.S. Supreme Court issued two ADR-related decisions, one fewer than last year, and the California Supreme Court published three decisions for the second consecutive year. The Ninth Circuit issued four decisions after issuing 15 in 2024, while the Courts of Appeal fell from 44 to 35. One of the decisions of the Courts of Appeal involved mediation specifically, but it did not have a significant impact on mediation practice. A discussion of the significant decisions follows.

## HEADLESS CLAIMS UNDER THE PRIVATE ATTORNEYS GENERAL ACT

The Private Attorneys General Act<sup>1</sup> continues to give rise to more ADR decisions than any other California statute. Following the decisions in *Viking River Cruises, Inc. v. Moriana*,<sup>2</sup> and *Adolph v. Uber Technologies, Inc.*,<sup>3</sup> individual PAGA claims were found to be arbitrable, but non-individual (representative) claims were not. However, courts have usually stayed the representative claim pending completion of the arbitration. This not only delays the pursuit of the representative claim but may force the representative's attorney to find a new plaintiff if the arbitrator rules in favor of the employer, because the original plaintiff is no longer an "aggrieved employee."<sup>4</sup>

To avoid the delay and possible risk of losing a plaintiff, attorneys developed the "headless PAGA claim," a lawsuit in which only a representative claim is filed. Headless PAGA claims first made their appearance in the appellate courts in *Balderas v. Fresh Start Harvesting, Inc.*<sup>5</sup> Balderas had filed a representative PAGA claim against her employer but did not seek individual relief. On its own motion, the trial court struck the complaint, citing the *Viking River* holding that an employee who fails to bring an individual claim against an employer does not have standing to file a representative claim.<sup>6</sup> While plaintiff's appeal was pending, our Supreme Court decided in *Adolph* that this *Viking River* requirement was incorrect. Thus, the Court of Appeal reversed, holding that there are only two

requirements for PAGA standing, to wit: Plaintiff must allege that he or she is (1) someone who was employed by the alleged violator; and (2) someone against whom one or more of the alleged violations were committed.<sup>7</sup> Balderas met these requirements. There was no substantive discussion whether an arbitrable individual claim is a required element of a PAGA claim.

*Balderas* was followed by *Leeper v. Shift, Inc.*<sup>8</sup> Leeper filed a representative PAGA claim but did not assert an individual claim. Defendants asserted that an individual claim is inherent in a PAGA cause of action and moved to compel arbitration of that individual claim and stay litigation of the representative claim. The trial court denied the motions, holding there was no individual claim, and representative claims cannot be arbitrated. Defendants appealed. The Second District Court of Appeal, Division 1 reversed, stating that Labor Code "section 2699, subdivision (a) describes a PAGA claim as 'a civil action brought by an aggrieved employee on behalf of the employee and other current or former employees'" and that "[t]he unambiguous and ordinary meaning of the word 'and' is conjunctive, not disjunctive."<sup>9</sup> Thus, the clause meant that the action described had *both* an individual claim component *and* a representative component and, therefore, plaintiff had to file an arbitrable individual claim, while the representative claim would be stayed pending completion of the arbitration.<sup>10</sup>

*Leeper* was followed by *Williams v. Alacrity Solutions LLC*.<sup>11</sup> Williams filed both an individual and representative claim. But he ultimately conceded that the individual claim was barred by the statute of limitations because he had failed to file a prelitigation notice with the Labor and Workforce Development Agency within one year of the alleged Labor Code violations, as required by section 2699, subdivision (d). Williams attempted to pursue the representative claim alone, but the trial court sustained defendant's demurrer. The question at the heart of Williams' appeal turned on whether an individual claim must always be part of a PAGA action. The Second District Court of Appeal, Division 5 agreed with Division 1's holding in *Leeper* that the word "and" was conjunctive and that there must

always be an individual claim when a representative claim is filed. Not only was an individual claim mandated by PAGA's text, there would be no way for a court to evaluate whether any claim is timely because PAGA does not obligate the PAGA plaintiff to define who the 'aggrieved employees are in the prelitigation notice. If a court does not know who the aggrieved employees were, it would be impossible to assess whether their claims were timely.<sup>12</sup>

But the Fifth District Court of Appeal went in a different direction. In *CRST Expedited, Inc. v. Superior Court*,<sup>13</sup> it concluded that the strictly conjunctive interpretation of the word "and" would be a disincentive to pursue PAGA claims because a requirement to pursue both individual PAGA claims and representative PAGA claims could greatly increase the time and effort required of a plaintiff to resolve the lawsuit. "In certain cases, the disincentive created by the extra effort might deter a plaintiff from pursuing *any* PAGA penalties whatsoever on the LWDA's behalf. This reduction in PAGA actions would undercut 'the vigorous assessment and collection of civil penalties as provided in the Labor Code.'" Thus, these consequences "support the conclusion that 'and' is ambiguous in the context of [the relevant subdivisions] of section 2699," and it was reasonable to interpret "and" broadly and not limit a plaintiff's choices to either pursue no PAGA claims or pursue all PAGA claims.<sup>14</sup>

The CRST court could have stopped at that point, but it decided to "resolve the ambiguity" by determining whether a requirement that an aggrieved employee pursue an individual PAGA claim in arbitration before pursuing the representative PAGA claims in court enhanced or diminished effective enforcement of California's labor laws. The court then concluded that arbitration impeded the state's intent. It cited three law review articles critical of arbitration that asserted: (1) employers enjoyed a higher percentage of favorable rulings when compared to court actions; (2) awards were, on average, lower than those obtained in court; and (3) procedural restraints, such as limitations on discovery, favored the employer.<sup>15</sup> It also disputed the argument that arbitration is speedy, citing *Rodriguez v. Lawrence Equipment*,

*Inc.*<sup>16</sup> and *Rocha*, where the arbitration in each case took roughly two years from filing to award without stating the time it generally takes a litigated matter to proceed from filing to decision. Finally, it concluded that empirical studies of arbitration outcomes suggest the employee is less likely to be found to be an aggrieved employee by an arbitrator than by a court.<sup>17</sup>

The California Supreme Court has agreed to review *Leeper* and *CRST*,<sup>18</sup> so the conflict may be resolved in 2026.

## FAILURE TO PAY FORUM FEES

Code of Civil Procedure sections 1281.97 and 1281.98 state that, in a consumer or employment arbitration agreement, if the drafting party fails to pay forum fees by the 30th day after the due date of an invoice sent by the provider, then the consumer or employee has the option to withdraw from the arbitration and take the dispute to court.<sup>19</sup> The two statutes have been strictly construed by the courts and enforced even where the drafting party's failure to timely pay was the result of clerical error or otherwise inadvertent.<sup>20</sup>

In 2024, two divisions of the Second District Court of Appeal came to opposite conclusions whether the statutes were preempted by the Federal Arbitration Act.<sup>21</sup> In both cases, defendant asserted that the late payments were inadvertent. In *Hohenshelt v. Superior Court*,<sup>22</sup> the Division 8 panel majority held that the statutes were not preempted because they did not disfavor arbitration. Neither statute ended the nascent arbitration, as the employee maintained the option of continuing in arbitration or returning to a judicial forum.<sup>23</sup> They both gave effect to the parties' agreement and furthered another of the FAA's main purposes, namely, ensuring the quick, inexpensive, and conclusive resolution to a dispute.<sup>24</sup> On the other hand, the Division 5 panel in *Hernandez v. Sohnen Enterprises, Inc.*,<sup>25</sup> ruled that the statutes were preempted. It held that the statutes limited the enforceability of certain types of arbitration agreements by allowing consumers and employees to avoid arbitration even in cases of minor,

inadvertent, or inconsequential delay. Imposing a higher standard for enforcement of arbitration agreements in consumer and employee disputes was contrary to the FAA's policy to ensure arbitration agreements are as enforceable as other contracts.

*Hohenshelt* reached the California Supreme Court this year.<sup>26</sup> The high court ruled that the statutes were not preempted by steering a middle course. The Supreme Court acknowledged that the text of section 1281.98<sup>27</sup> was being applied strictly by the Court of Appeal, regardless of whether an untimely payment was deliberate or inadvertent. But it cautioned that “[w]hen the Legislature intends for a statute to prevail over all contrary law, it typically signals this intent by using phrases like “notwithstanding any other law” or “notwithstanding other provisions of law.””<sup>28</sup> The Legislature did not do so here. The Supreme Court explained “the Legislature enacted section 1281.98 against the backdrop of longstanding statutes that authorize courts to prevent unjust forfeitures of contractual rights.”<sup>29</sup> The court then cited three other statutes that would ameliorate the harsh interpretations of the statute so that application of the statute would treat arbitration contracts in a manner no different from other contracts: (1) Civil Code section 3275, providing forfeiture relief where full compensation can be made and no grossly negligent, willful, or fraudulent breach of duty; (2) Civil Code section 1511, excusing breach where performance impossible, illegal, or impractical “because of extreme and unreasonable difficulty, expense, injury, or loss involved;” and (3) Code of Civil Procedure section 473, subdivision (b) which relieves a party or its legal representative from a judgment, dismissal, order, or other legal proceeding that was taken because of mistake, inadvertence, surprise, or excusable neglect.<sup>30</sup>

The Supreme Court then examined the legislative history of section 1281.98 to determine whether it was intended to limit the ordinary operation of these three statutes.<sup>31</sup> That history identified the willful withholding of fees as the mischief it sought to remedy. The Senate Rules Committee noted that the bill was designed to “deter companies and employers from *strategically withholding* the payment

of arbitration fees.”<sup>32</sup> Similarly, the Assembly Committee on Judiciary observed: “The sanctions provided in this bill are intended to deter *bad actors*.”<sup>33</sup> Nothing in the legislative history suggested that the Legislature intended to penalize inadvertent or excusable delay.

Instead of imposing a higher standard for enforcement of arbitration agreements, as asserted in *Hernandez*, the Supreme Court ruled that section 1281.98 be “construed in harmony with background statutes” to “make[] arbitration contracts enforceable on the same grounds as those that apply to other contracts: When a party breaches its contractual obligations willfully, fraudulently, or with gross negligence, it cannot escape the consequences by pointing to a lack of harm to the other party. But short of such wrongful conduct, a breaching party may be relieved from forfeiting its right to enforce an arbitration agreement based on the circumstances, as provided by long-standing legal principles.”<sup>34</sup> Accordingly, the Supreme Court transferred *Hernandez* back to the lower appellate court “with directions to vacate its decision and reconsider the cause in light of *Hohenshelt*.”<sup>35</sup>

The Court of Appeal has published one case on this issue since *Hohenshelt* was decided. In *Wilson v. TAP Worldwide LLC*,<sup>36</sup> the trial court followed the then existing Court of Appeal precedent and permitted plaintiff Wilson to withdraw from the arbitration after defendant’s electronic payment, issued before the deadline, was somehow delayed and arrived at the provider’s office three days after the deadline. The trial court also granted Wilson \$11,000 in attorney fees, which apparently was the cost of filing the motion. Wilson thought he should be entitled to all the fees charged for the arbitration, which he asserted amounted to \$300,000. Consequently, he appealed. *Hohenshelt* was decided while the appeal was pending. The court thereupon reversed the grant of attorney fees in its entirety, quoting *Hohenshelt*, “that if section 1281.98 were construed to mean that any failure to make timely payment, regardless of the circumstances, invariably resulted in forfeiture of arbitral rights,’ . . . the FAA would preempt the statute.”<sup>37</sup> Because the FAA preempted section

1281.98 as applied by the trial court, the fee award premised on that interpretation could not stand.

## THE UNITED STATES SUPREME COURT CASES

There were two ADR-related cases decided by the U.S. Supreme Court in the 2024–2025 term.

In *Waetzig v. Halliburton Energy Services*,<sup>38</sup> Waetzig sued Halliburton, his former employer, and Halliburton demanded that Waetzig arbitrate. Waetzig agreed, but instead of seeking a stay from the district court, he moved to dismiss his lawsuit. Because Halliburton had not filed an answer, the motion was treated as a voluntary dismissal without prejudice. The arbitrator ruled for Halliburton. Waetzig believed that the arbitrator failed to follow procedural requirements set forth in the arbitration agreement. Rather than file a new suit to vacate the award, Waetzig filed a motion to reopen the dismissed case under Federal Rules of Civil Procedure, rule 60(b), which allows a litigant to seek relief from a final order, judgment, or proceeding on the ground of mistake, inadvertence, surprise, or excusable neglect. The district court held that a voluntary dismissal is a “final proceeding” and that Waetzig had made a careless mistake when he dismissed his lawsuit under the false assumption that the court would retain jurisdiction over the arbitration agreement. It reopened the case and granted Waetzig’s motion to vacate.

Halliburton appealed, arguing that the district court did not have jurisdiction over the motion and that a voluntary dismissal is not a final order, judgment or proceeding. The Tenth Circuit agreed.<sup>39</sup> The U.S. Supreme Court granted Waetzig’s petition for certiorari and reversed.

The U.S. Supreme Court held that before the district court could rule on Waetzig’s motion to vacate, it first needed to reopen his case, and it did so, pursuant to rule 60(b). A voluntary dismissal without prejudice falls comfortably within the definition of final judgment, order, or proceeding. A dismissal completes the particular lawsuit at

issue and terminates the action itself.<sup>40</sup> Thus, it is a “final judgment.”

A voluntary dismissal without prejudice counts as a “proceeding” under rule 60(b). Halliburton argued that the term “proceeding” is given more precise content by the neighboring words with which it is associated. Specifically, it asserted that the term “proceeding” should be read to include the characteristics of the terms that come before it: “judgment” and “order.” But the U.S. Supreme Court held:

Such a limited reading of “proceeding” is contrary to the general structure of Rule 60(b). When the rule authorizes relief from a “judgment, order, or proceeding,” it speaks in an ascending order of generality. It starts with the narrowest category, “judgments,” and then moves to a broader category, “orders.” Any “judgment” will generally involve an “order,” but not all “orders” are “judgments.” That suggests that each term should be read as broader than what came before. Just as “order” encompasses and exceeds “judgment,” “proceeding” should encompass and exceed “order.” It would be odd, therefore, to read “proceeding” as covering only those acts that are already covered by the term “order.”<sup>41</sup>

Finally, the voluntary dismissal was clearly an “order.”

The U.S. Supreme Court’s review encompassed the motion to reopen, not the motion to vacate. Thus, the matter was remanded to the district court to determine whether the award should be vacated.

In *CC/Devas (Mauritius) Ltd. v. Antrix Corp.*,<sup>42</sup> plaintiff filed a motion in the Western District of Washington to confirm an arbitration award that it obtained against Antrix, an entity owned by the Republic of India. Antrix asserted that the court did not have jurisdiction because it was owned by a foreign sovereign and immune from suits in the courts of the United States as set forth in the Foreign Sovereign Immunities Act.<sup>43</sup> CC/Devas argued that

the court had jurisdiction pursuant to the arbitration exception that applied to cases filed under the FSIA.

The arbitration exception applies where the “agreement or award” is “governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.”<sup>44</sup> The United States, for instance, has acceded to the New York Convention, which requires it to enforce certain awards issued abroad.<sup>45</sup>

The district court agreed and confirmed the award. Antrix appealed, and the Ninth Circuit reversed.<sup>46</sup> It did not question that Antrix was a “foreign state” under the FSIA, that an immunity exception applied, and that Devas effectuated proper service. The panel explained the act also required a traditional minimum contacts analysis. It found that these minimum contacts were lacking, and it dismissed the suit. CC/Devas appealed to the U.S. Supreme Court, which granted certiorari.

CC/Devas argued that subdivision (b) stated that the exception would apply in any case where the district courts have subject-matter jurisdiction and where proper service has been made. The U.S. Supreme Court agreed and reversed. The court explained, Subdivision (b) imposes two substantive requirements. First, district courts have subject-matter jurisdiction when any of the FSIA’s immunity exceptions applies. Second, service is proper when a plaintiff complies with the FSIA’s specialized service-of-process rules.<sup>47</sup> “When both criteria are satisfied, the statute declares that personal jurisdiction ‘shall exist,’ and, ‘as in other contexts, the use of the word “shall” creates an obligation impervious to judicial discretion.’”<sup>48</sup> “Thus, the most natural reading” of the statute “is that personal jurisdiction over a foreign sovereign is ‘automatic’ whenever (1) ‘an exception to immunity applies’ and (2) ‘service of process has been accomplished.’ . . . [¶] Notably absent from § 1330(b) is any reference to ‘minimum contacts.’”<sup>49</sup>

## MEDICAL INJURY COMPENSATION REFORM ACT

In *Holland v. Silverscreen Healthcare, Inc.*,<sup>50</sup> plaintiffs sued Silverscreen following the death of their son, Skyler, while he was a patient at a nursing home operated by Asistencia, which Silverscreen owned. The complaint listed several instances where Asistencia purportedly failed to provide adequate medical care for Skyler. It asserted four causes of action: (1) dependent adult abuse under the Elder Abuse Dependent Adult Care Protection Act;<sup>51</sup> (2) negligence; (3) violation of residents' rights under Health and Safety Code section 1430, subdivision (b); and (4) wrongful death. Skyler's mother brought the first three causes of action, survivor claims, as his successor in interest. Both parents brought the wrongful death cause of action in their personal capacities.

When Skyler entered the nursing home, he signed an agreement that contained an arbitration clause that complied with the Medical Injury Compensation Reform Act.<sup>52</sup> Silverscreen thereupon filed a motion to compel arbitration, relying on MICRA and *Ruiz v. Podolsky*<sup>53</sup> for its claim that the wrongful death claim was arbitrable. The trial court granted the motion to compel arbitration of the three survivor claims but denied it with respect to the wrongful death claim, holding that plaintiffs had alleged that Skyler's death arose from a violation of the Elder Abuse Act, not professional negligence, as required by MICRA. The Court of Appeal reversed the holding on the wrongful death claim, stating that plaintiffs' "barebones claim" sounded in professional negligence.<sup>54</sup>

The California Supreme Court reversed and remanded, explaining:

Only acts or omissions by a skilled nursing facility in its capacity as a health care provider fall under the banner of professional negligence. By contrast, 'a failure to fulfill custodial duties owed by a custodian who also happens to be a health care provider . . . is at most incidentally

related to the provider's professional health care services.' The failure to provide basic necessities, such as assistance in personal hygiene, food, hydration, or clothing, are paradigmatic examples of a failure to fulfill custodial duties. The same is true of a failure to provide an adequate and habitable living space or protect from routine safety hazards. Similarly, a failure of staff to attend to, monitor, or assist a resident in obtaining appropriate medical care generally falls on the custodial side of the line because such omissions involve 'not . . . the *undertaking* of medical services, but the failure to *provide* medical care.'<sup>55</sup>

Applying these principles, the court held there was no way to square the Court of Appeal's decision with the limited scope of section 1295, subdivision (a) and, thus, the scope of *Ruiz*.<sup>56</sup>

Silverscreen contended that "allowing plaintiffs to avoid arbitration despite their 'barebones claim' would effectively allow them 'to circumvent *Ruiz* through intentionally opaque pleading.'"<sup>57</sup> The Supreme Court agreed that plaintiffs' pleadings were spare: lacking allegations connecting the factual predicate of the claim to the claim of injury and explanation of how alleged understaffing, facility failures, and failure to meet basic needs caused Skyler to fall or incur infections, leading to his eventual death. "Without more information, it [wa]s impossible to assess whether plaintiffs' wrongful death claim was based on the negligent rendering of medical services (in which case *Ruiz* applie[d]), or instead on the facility's nonmedical neglect (in which case it d[id] not)."<sup>58</sup> The court concluded that "the appropriate disposition" was "to give plaintiffs a chance to provide additional details on remand before determining whether their wrongful death claim fell within the scope of section 1295 and thus must be ordered to arbitration."<sup>59</sup>

## STATE BAR-PROHIBITION AGAINST ADR PRACTICE BY INACTIVE MEMBERS

State Bar Rules of Professional Conduct, rule 2.30 bars its inactive members from practicing as either arbitrators or mediators. An attorney must either retain active membership or resign from the bar in order and to become either an arbitrator or mediator. When attorney Morris Getzels retired to become a full time arbitrator and mediator, he applied to become an inactive member, but rule 2.30 precluded him from so doing. He sued the State Bar, asserting that the rule denied him equal protection, given that non-members of the bar, even disbarred attorneys, were permitted to serve as arbitrators and mediators, and that there was no rational basis for the rule. The bar's demurrer was sustained without leave to amend, and Getzels appealed.

The Second District Court of Appeal affirmed.<sup>60</sup> It explained, "[W]hen a statute involves neither a suspect classification nor a fundamental right, the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute" withstands rational basis review.<sup>61</sup> Such review "is traditionally applied in cases examining equal protection claims involving regulations governing professional licensing and conduct, including in the legal profession."<sup>62</sup>

The Court of Appeal disagreed with Getzels' argument. It explained that "[r]ule 2.30's distinction between licensees who engage in conduct considered closely related to the practice of law and those who distance themselves from such conduct bears a rational relationship to the goal of assuring the professional conduct of licensees," a legitimate state interest.<sup>63</sup> The bar "could rationally conclude that an inactive licensee 'occupying a position wherein he or she is called upon in any capacity to give legal advice or counsel or examine the law or pass upon the legal effect of any act, document or law, would burden its regulatory system' because the bar 'could receive complaints about attorneys serving as arbitrators or mediators and would need to assess and respond to them. . . . It is rational to conclude that licensees who act as private

arbitrators and mediators should be required to continue paying active annual licensee fees, whereas those who have distanced themselves from the practice of law should not."<sup>64</sup>

Furthermore, the appellate court found a rational basis for Rule 2.30's disparate treatment of inactive licensees compared to non-licensees: "Arbitrators and mediators who are not licensees are not subject to the State Bar's jurisdiction. Non-licensees therefore would not burden the State Bar's regulatory system and cause the State Bar to incur costs."<sup>65</sup>

## APPEAL FROM LIFTING STAY OF ARBITRATION

Plaintiffs filed a class action against defendant ACE American Insurance Co. alleging wage and hour violations.<sup>66</sup> The trial court granted ACE's motion to compel arbitration. No parties filed an arbitration demand. Plaintiffs argued that the burden to file the demand belonged to ACE, and they moved to lift the stay, arguing that ACE had waived its right to arbitration by failing to initiate it. The court agreed and lifted the stay. ACE appealed. Plaintiffs moved to dismiss the appeal, arguing that the California Arbitration Act<sup>67</sup> barred appeals from orders lifting stays.

The Court of Appeal reversed. The trial court's order differed from an order denying a motion to compel arbitration only in its timing. By lifting the stay after granting ACE's motion to compel, the trial court left ACE in the same position as if it had denied the motion to compel in the first place. California courts have concluded orders that are the "functional equivalent" of denying a petition to compel arbitration are appealable under Code of Civil Procedure section 1294, subdivision (a).<sup>68</sup>

Plaintiffs argued that the functional equivalent doctrine violated the rule that arbitration contracts should be treated like all other contracts by treating orders concerning arbitration agreements as appealable where other orders would not be. The functional equivalent doctrine does not create a

special exception for cases involving arbitration agreements but rather is an application of the general rule that an appeal may be taken from an order not specified in a statute as appealable if in legal effect it is tantamount to one or more of the orders listed. To disregard the functional equivalent doctrine here would in effect single out appeals of arbitration orders for special disfavor.<sup>69</sup>

The trial court's order was also appealable under federal law. Section 3 of the FAA entitles litigants in federal court to a stay of any action that is referable to arbitration under an agreement in writing. Section 16(a)(1)(A), in turn, allows an appeal from an order refusing a stay of any action under section 3. The trial court's order in this case was an order refusing a stay under section 3 of the FAA.<sup>70</sup>

## DISCOVERY RESTRICTIONS

In *Aixtron, Inc. v. Veeco Instruments, Inc.*,<sup>71</sup> the Court of Appeal held that an arbitrator could not compel prehearing third party discovery when the arbitration agreement failed to explicitly authorize discovery from nonparties or failed to incorporate the statute then in effect that authorized prehearing discovery or even contained the word "discovery," and thus the arbitrator did not have the authority to issue a subpoena compelling prehearing discovery from the third party. In *Vo v. Technology Credit Union*,<sup>72</sup> the trial court cited *Aixtron* when it denied defendant's motion to compel arbitration because the agreement similarly made no specific mention of the CAA or third-party discovery.

But *Aixtron* did not consider whether the arbitration agreement was unconscionable. Rather, the appellate court considered the authority of the arbitrator to order and compel discovery from a nonparty where that party objected to the arbitrator's order.

Subsequently, in *Ramirez v. Charter Communications, Inc.*,<sup>73</sup> the California Supreme Court, without disapproving or discussing *Aixtron*, made clear that failure to provide for adequate discovery in an arbitration agreement is an element

of unconscionability, and so a finding of unconscionability turns on whether a party has access to adequate discovery to vindicate its claims. With *Ramirez I* in mind, the Sixth District Court of Appeal held in *Vo* that giving the arbitrator authority to expand discovery was one way to ensure adequate discovery was available and that when a clause is ambiguous as to whether the arbitrator can order additional discovery and susceptible to an interpretation that either renders it valid or void, the court should select an interpretation that makes the contract valid. The agreement in *Vo* provided that the JAMS Comprehensive Arbitration Rules were incorporated therein and would control the arbitration procedures. JAMS rule 17(b) allowed both parties to take one deposition of the opposing party or individual under the control of the opposing party without the arbitrator's approval and gave the arbitrator the authority to expand discovery, permitting *Vo* the opportunity to obtain the third-party discovery required to adequately arbitrate his claims.<sup>74</sup> Thus, the court disapproved of *Aixtron* to the extent its approval of discovery clauses was limited, i.e., the agreement had to explicitly state that third-party discovery was available before the clause could be enforced.<sup>75</sup>

## SEVERANCE OF UNCONSCIONABLE PROVISIONS

Unconscionability also arose as an issue in *Ramirez I*. The California Supreme Court affirmed a ruling by the Court of Appeal<sup>76</sup> that three clauses in the arbitration agreement were unconscionable and hence unenforceable.<sup>77</sup> But the court remanded the case to the Court of Appeal to determine whether the unconscionable clauses were severable so that the remainder of the agreement might be enforced. In so doing, the high court stated that a court cannot refuse to enforce an agreement simply by finding that two or more collateral provisions are unconscionable as written and eschewing any further inquiry.<sup>78</sup>

On remand, the Court of Appeal declined to sever.<sup>79</sup> First, it was skeptical of Charter's position that the unconscionable provisions were collateral to the

contract's main purpose. Charter's characterization that the central purpose of the agreement was to "mutually arbitrate disputes arising out of or relating to [Ramirez's] pre-employment application and/or employment with Charter or the termination of that relationship" was belied by the agreement's lack of mutuality regarding arbitrable claims. Second, the appellate court doubted if the unconscionable provisions could be severed without reformation of the agreement. Section C of the agreement specifically excluded 14 claims from arbitration. Although Ramirez could bring some of these claims, most of them were ones that were more likely to be brought by the employer against the employee. By deleting section C, thereby subjecting all 14 claims to arbitration, the court would be effectively rewriting the agreement to cover claims Ramirez did not agree to arbitrate.<sup>80</sup>

The court could have stopped at that point because it had clearly articulated why severance was unavailable. But it added that even if it were possible to sever the unconscionable provisions,

... severance [wa]s still not warranted because "enforcing the balance of the contract would not be in the interests of justice." The multiple defects in the Agreement "indicate[d] that ... Charter engaged in a systematic effort to impose arbitration on the weaker party not simply as an alternative to litigation, but to secure a forum that worked to the stronger party's advantage..."

Specifically, the agreement impermissibly convey[ed] the following to the employee: her claims were likely subject to arbitration but claims likely to be brought by Charter against her [we]re exempt from arbitration; ... Mere severance of these provisions and enforcement of the remainder of the Agreement could "create an incentive for an employer to draft a one-sided arbitration agreement in the hope employees would not challenge the unlawful provisions, but if they d[id], the court would simply

modify the agreement to include the bilateral terms the employer should have included in the first place."<sup>81</sup>

Although one cannot quarrel with the appellate court's comments, there is still a question whether multiple unconscionable provisions alone can bar severance.

## ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT

In *Casey v. Superior Court*,<sup>82</sup> plaintiff sued D.R. Horton, Inc., her former employer, for sexual harassment. Horton moved to compel arbitration, citing an arbitration agreement that clearly stated that only the CAA applied. Plaintiff argued the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act,<sup>83</sup> which is part of the FAA, preempted the CAA and the FAA applied because Horton was engaged in interstate commerce. The court granted Horton's motion. Plaintiff filed a writ, which the Court of Appeal granted.

Finding conflict preemption present, the Court of Appeal directed the trial court to vacate its order granting Horton's motion to compel arbitration. The court explained

conflict preemption is present when "it is impossible for a private party to comply with both state and federal requirements ... or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" [¶] The EFAA's purpose is plainly obstructed by an attempt to use state law to force a person who is alleging sexual harassment to arbitrate a dispute.<sup>84</sup>

The appellate court noted that the EFAA's text "explicitly states that 'a person alleging conduct constituting a sexual harassment dispute' may elect that 'no predispute arbitration agreement ... shall be valid or enforceable with respect to a case which ... relates to the ... sexual harassment dispute.'" It explained:

This language is clear, and it differs from the portion of section 2 that governs all other cases—i.e., cases not relating to a sexual harassment dispute—in at least two key respects that bear on the preemption analysis. First, the EFAA rejects the policy of favoring enforceability of arbitration agreements and replaces it with a rule of *unenforceability* of arbitration agreements in cases<sup>85</sup> relating to a sexual harassment dispute. Second, the EFAA has no exceptions to its rule of unenforceability, while the portion of section 2 governing other cases has exceptions to its policy of enforceability.<sup>86</sup>

In a second case involving the EFAA,<sup>87</sup> the trial court denied the defendant’s motion to compel arbitration even though the plaintiff’s brief made no mention of the EFAA because the complaint contained a cause of action for sexual harassment. On appeal, the defendant argued, *inter alia*, that plaintiff’s failure to mention the EFAA constituted a failure to make an “election” to assert his rights under the EFAA. The Court of Appeal rejected the argument, holding that the term “election” should be interpreted broadly and thus plaintiff’s decision to file his complaint in court was the requisite election.

## ENDNOTES

\* **Paul Dubow** has served as an arbitrator and mediator since 1994 and has been a full time neutral since January 2001. In that period, he has conducted hearings in approximately 250 cases and has acted as the mediator in approximately 320 cases. He concentrates on cases involving employment disputes, attorney fee disputes, and ERISA withdrawal liability.

He is a Fellow and former board member of the College of Commercial Arbitrators, former chair of the State Bar Task Force on Complex Litigation, a member of the committee that drafted the original employment rules for the American Arbitration Association and a member of the Judicial Council working group that drafted the Rules of Conduct for Mediators in Court Connected Mediations. He currently serves as a member of the State Bar Working Group on ADR Certification.

Prior to becoming a full time neutral, Paul spent 26 years as director of litigation at Dean Witter Reynolds.

During that period, he tried approximately 130 arbitrations and eleven court trials, initially in the securities field and later in the employment field.

1. Lab. Code, § 2699 (PAGA).
2. (2022) 596 U.S. 639 (*Viking River*).
3. (2023) 14 Cal.5th 1104 (*Adolph*).
4. See *Rocha v. U-Haul Co. of California* (2023) 88 Cal. App.5th 65, 77–82 (*Rocha*).
5. (2024) 101 Cal.App.5th 533 (*Balderas*).
6. The Supreme Court cited *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73 (*Kim*), as the basis for its holding. In fact, the *Kim* court held the opposite. The court permitted an employee who settled his individual claim against the employer to pursue his representative claim because the settlement did not bar him from being an aggrieved employee.
7. *Balderas, supra*, 101 Cal. App. 5th at pp. 538–539.
8. (2024) 107 Cal.App.5th 1001, review granted Apr. 16, 2025, S289305 (*Leeper*).
9. *Id.* at p. 1009 (emphasis added).
10. *Ibid.*
11. (2025) 110 Cal. App. 5th 932.
13. *Id.* at p. 943.
14. (2025) 112 Cal.App.5th 872, review granted Sept. 17, 2025, S292005 (CRST). See also *Galarsa v. Dolgen California LLC* (2025) 115 Cal.App.5th 1.
15. CRST, *supra*, 112 Cal. App. 5th at pp. 909–910.
16. Gauffeny, *The PAGA Problem: Conflict Between California Employment Policy and Federal Arbitration Act Expansion* (2024) 57 Loyola L.A. L. Rev. 167, 201–203; Chandrasekher & Horton, *Arbitration Nation: Data from Four Providers* (2019) 107 Cal. L. Rev. 1, 18–26; St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?* (2017) 32 Ohio St. J. on Disp. Resol. 1, 14.
17. (2024) 106 Cal.App.5th 645.
18. CRST, *supra*, 112 Cal.App.5th at pp. 915–916.
19. *Leeper v. Shift, Inc.* (review granted Apr. 16, 2025, S289305); *CRST Expedited, Inc. v. Superior Court* (review granted Sept. 17, 2025, S292005).
20. The two statutes are virtually identical. Section 1281.97 applies to fees necessary to commence an arbitration, and section 1281.98 applies to fees incurred during the arbitration.
21. *Cvejic v. Skyview Capital, Inc.* (2023) 92 Cal.App.5th 1073, 1078–1079; *Doe v. Superior Court (Na Hoku, Inc.)* (2023) 95 Cal.App.5th 346, 358–361; *Espinoza*

- v. *Superior Court* (2022) 83 Cal.App.5th 761, 776; *De Leon v. Juanita's Foods, Inc.* (2022) 85 Cal.App.5th 740, 752–755; *Williams v. West Coast Hospitals, Inc.* (2022) 86 Cal.App.5th 1054, 1073–1074.
22. 9 U.S.C. § 1 et seq. (FAA).
  23. (2024) 99 Cal.App.5th 1319, revd. (2025) 18 Cal.5th 310 (*Hohenshelt*).
  24. *Id.* at p. 480.
  25. *Ibid.*
  26. (2024) 102 Cal.App.5th 222, cause trans. & ordered depublished Nov. 19, 2025, S285696 (*Hernandez*).
  27. (2025) 18 Cal.5th 310.
  28. *Hohenshelt* only concerned section 1281.98. But, given that the two statutes are virtually identical, the court's discussion of section 1281.98 would apply equally to section 1281.97.
  29. *Hohenshelt, supra*, 18 Cal.5th at p. 332.
  30. *Ibid.*
  31. *Id.* at pp. 332–334.
  32. *Hohenshelt, supra*, 18 Cal. App. 5th at pp. 336–339.
  33. Sen. Com. on Judiciary, Analysis of Sen. Bill No. 707 (2019–2020 Reg. Sess.) p. 4. (emphasis added).
  34. Assem. Com. on Judiciary, Analysis of Sen. Bill No. 707 (2019–2020 Reg. Sess.) p. 8 (emphasis added).
  35. *Hohenshelt, supra*, 18 Cal. App. 5th at p. 346.
  36. (Nov. 19, 2025) S285696 (Mem.).
  37. (2025) 114 Cal.App.5th 1077 (*Wilson*).
  38. *Id.* at p. 1087.
  39. (2025) 604 U.S. 305 (*Waetzig*).
  40. See *Waetzig v. Halliburton Energy Services* (2023) 82 F.4th 918.
  41. *Waetzig, supra*, 604 U.S. at p. 313.
  42. *Id.* at p. 317.
  43. (2025) 605 U.S. 223 (*CC/Devas*).
  44. 28 U.S.C. § 1330 (FSIA).
  45. See 28 U.S.C. § 1605(a)(6)(b).
  46. Also known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See 9 U.S.C. § 201.
  47. See *Devas Multimedia Private Ltd. v. Antrix Corp.* (9th Cir. Aug. 1, 2023, Nos. 20-36024, 22-35085, 22-35103) 2023 WL 4884882.
  48. See 28 U.S.C. § 1608(a).
  49. *CC/Devas, supra*, 605 U.S. at p. 232 (quoting *Smith v. Spizziri* (2024) 601 U.S. 472, 476).
  50. *Id.* at pp. 232–233 (internal citations omitted).
  51. (2025) 18 Cal.5th 364 (*Holland*).
  52. Welf. & Inst. Code, § 15600 et seq. (Elder Abuse Act).
  53. Code Civ. Proc., § 1295, subd. (a) (MICRA).
  54. (2010) 50 Cal.4th 438. (*Ruiz*).
  55. See *Holland v. Silverscreen Healthcare, Inc.* (2025) 101 Cal.App.5th 1125.
  56. *Holland, supra*, 18 Cal.5th at p. 380 (citations omitted).
  57. *Id.* at pp. 380–381.
  58. *Id.* at p. 385 (citations omitted).
  59. *Ibid.*
  60. *Ibid.*
  61. See *Getzels v. State Bar of California* (2025) 112 Cal. App.5th 388 (*Getzels*).
  62. *Id.* at p. 399 (internal quotation marks and citations omitted).
  63. *Ibid.* (citation omitted).
  64. *Id.* at pp. 401–402.
  65. *Id.* at p. 402 (internal citation omitted).
  66. *Ibid.*
  67. *Arzate v. ACE American Insurance Co.* (2025) 108 Cal. App.5th 1191 (*Arzate*).
  68. Code Civ. Proc., § 1280 et seq. (CAA).
  69. See *Hernandez, supra*, 02 Cal. App. 5th at p. 236.
  70. *Arzate, supra*, 108 Cal.App.5th at p. 1198.
  71. *Id.* at p. 1199.
  72. (2020) 52 Cal.App.5th 360 (*Aixtron*).
  73. (2025) 108 Cal.App.5th 632 (*Vo*).
  74. (2024) 16 Cal.5th 478 (*Ramirez I*).
  75. *Vo, supra*, 108 Cal.App.5th at p. 647.
  76. The procedural posture of *Vo* and the JAMS rules in effect when the *Vo* contract was formed differed from that in *Aixtron*. In *Aixtron*, a third party appealed the trial court orders enforcing compliance with an arbitrator's subpoena to produce records; the JAMS rules in effect when the *Aixtron* agreement was drafted did not have an explicit reference to third party discovery, and there apparently was no provision for the ability of the arbitrator to expand discovery. Here, both *Vo* and respondent were parties to the agreement, and no third party was refusing to comply with a subpoena. Presumably, in the minds of plaintiff and the trial court, the mere possibility of a third party's resistance

to discovery was enough to render the agreement unenforceable. But even if that were a valid reason to consider enforceability, the arbitrator had the power to enforce a third-party discovery request because of the ability to expand discovery.

77. See *Ramirez v. Charter Communications, Inc.* (2022) 75 Cal.App.5th 365.
78. The Court of Appeal ruled that four of the clauses were unconscionable, but the Supreme Court held that the discovery provision was not unconscionable. See *Ramirez, supra*, 16 Cal.5th at pp. 503–507.
79. *Id.* at p. 518.
80. See *Ramirez v. Charter Communications, Inc.* (2025) 108 Cal.App.5th 1297 (*Ramirez II*).
81. *Id.* at pp. 1305–1306.
82. *Id.* at pp. 1306–1307 (quoting *Ramirez I, supra*, 16 Cal.5th at pp. 516–517) (internal citations omitted).
83. (2025) 108 Cal.App.5th 575 (*Casey*).
84. 9 U.S.C. §§ 401–402 (EFAA).
85. *Casey, supra*, 108 Cal.App.5th at pp. 584–585 (quoting *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923) (internal citations omitted).
86. 9 U.S.C. § 402 (a) states that the exemption applies to the *case*, not individual claims, where a plaintiff alleges conduct constituting sexual harassment or sexual assault. And so, once properly invoked, the EFAA renders an arbitration agreement unenforceable as to the *entire case*, not merely the sexual harassment claim. See *Casey, supra*, 108 Cal.App.5th at p. 588; *Liu v. Miniso Depot CA, Inc.* (2024) 105 Cal.App.5th 791, 796; *Doe v. Second Street Corp.* (2024) 105 Cal.App.5th 552, 577.
87. *Casey, supra*, 108 Cal.App.5th at pp. 584–585.
88. *Quilala v. Securitas Security Services USA* (2025) 117 Cal. App.5th 75.

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# AMERICA'S ENDURING COMMITMENT TO INTELLECTUAL PROPERTY AND SCIENTIFIC ADVANCEMENT

By the early Twentieth Century, the United States of America had become a world leader in technological innovation and economic growth. This sustained period of global technological dominance has been unprecedented in the modern era and continues virtually unchallenged today. For context, there are currently twelve companies in the world with market capitalizations over \$1 trillion.<sup>1</sup> Ten of these companies are in the U.S. Eight of those are technology companies, and the remaining two—representing finance and pharmaceuticals—are closely adjacent.<sup>2</sup>

The U.S.'s technological dominance contributes to a substantial economic advantage for its economy. The U.S. remains the world's largest economy in absolute terms,<sup>3</sup> and significantly, its GDP per capita dwarfs that of other large nations.<sup>4</sup> For example, the U.S.'s GDP per capita (\$89,678) is nearly 55% higher than that of Germany (\$57,914), often considered to be the dominant economy in the European Union.<sup>5</sup> These advantages can be traced directly to the U.S.'s innovation economy. For example, intellectual-property-intensive sectors of the U.S. economy contributed \$7.8 trillion in GDP in 2019.<sup>6</sup>

Three factors have led to the U.S.'s success. First, the U.S. possesses a robust network of research universities that attract the best and the brightest from around the world while providing fertile ground—and a pipeline of ideas—for innovation incubation. Second, the U.S. possesses a robust financial system that rewards risk-taking and provides substantial access to capital. Third, the U.S. offers a stable legal system that protects intellectual property rights and encourages investments in innovation. If the U.S. is to maintain its position of dominance in the global innovation economy, it must protect and cultivate these important institutions.

## THE U.S. HIGHER EDUCATION SYSTEM PROVIDES A UNIQUELY COMPETITIVE POOL OF TALENT

The U.S.'s higher education system provides a substantial advantage in innovation growth.<sup>7</sup> There are famous universities—MIT, Caltech, Stanford, and the Ivy League, to name a few—but the U.S. has scores of other great research institutions.<sup>8</sup> Universities play a crucial role in facilitating innovation across the country and have an outsized impact “seeding innovation” in those regions outside the major metropolitan areas, which have a less-developed high-tech private sector.<sup>9</sup> The breadth of top-tier higher educational institutions offers numerous educational opportunities to U.S. students and attracts top talent from around the world.

The Times Higher Education World University Rankings provide a glimpse into U.S. higher education's global standing.<sup>10</sup> U.S. universities hold seven of the top ten positions, and the U.S. dominates across the top two hundred universities, holding fifty-five.<sup>11</sup>

The prestige and reputations of U.S. universities attract elite candidates from around the world. Approximately 1.2 million international students were enrolled in U.S. colleges and universities for the 2024–2025 academic year, which represented a 5% increase from the prior year.<sup>12</sup> These students account for 6% of the U.S. higher education student body; often pay full-tuition, subsidizing U.S. students; and contribute roughly \$55 billion to the U.S. economy while supporting 355,000 jobs.<sup>13</sup> The majority (57%) study in the STEM fields, where they perform important, often groundbreaking, research and innovation.<sup>14</sup> And of course, while on campus, they contribute to the free exchange of ideas that creates innovation and knowledge.

These students also play a critical role in long-term U.S. innovation. Although many return to their home countries after graduation, a substantial number do not. Studies suggest that almost half of the founders (44%) of U.S. “unicorns”—small, innovative companies that begin as startups and obtain valuations over \$1 billion—were born outside the U.S.<sup>15</sup> Indeed, examining the ten largest U.S. companies discussed

above, exactly half (NVIDIA, Alphabet, Microsoft, Broadcom, and Tesla) are run by CEOs who were born outside the U.S.<sup>16</sup> Each of these individuals immigrated to the U.S. to attend a U.S. college or university, chose to become a naturalized U.S. citizen, and contributed substantially to the country's innovation economy. The strength of the U.S.'s colleges and universities, therefore, plays a critical role in attracting and developing the talent essential for continued innovation and growth.

The past year has proven a harrowing time for the nation's universities in general, and international students in particular. Despite an attempted ban on international students at Harvard,<sup>17</sup> and a host of other policies aimed at restricting research funding and limiting visa opportunities,<sup>18</sup> international student enrollment remained relatively constant through the start of the 2025–2026 school year.<sup>19</sup> The long-term impacts of the current administration's immigration and higher-ed policies remains to be seen and has not been fully factored into available statistics, including overall international attendance numbers and global university rankings, which depend on older datasets. However, it is worth noting that the administration seems to have adopted a more conciliatory tone, with the President recently acknowledging both the economic necessity and benefits of international students.<sup>20</sup>

Any erosion of the U.S. higher education system could pose a substantial threat to the country's continued preeminence at the forefront of innovation, particularly as universities around the world are becoming increasingly competitive with those in the U.S.<sup>21</sup> As the nation faces mounting global competition, it must work to protect and improve those very institutions which have set it apart thus far.

## INVESTMENT CAPITAL AND U.S. INNOVATION

Access to capital plays a critical role in innovation growth. Studies have found a strong positive impact on innovation from venture capital and early-stage investment.<sup>22</sup> The U.S.'s unparalleled access to venture capital has contributed to its innovation dominance relative to other countries. Historically,

the U.S. outpaced Europe in both private- and public-sector research and development spending.<sup>23</sup> Compounding this advantage, U.S. R&D expenditures have tended to focus in high-tech sectors (e.g., information and communication technologies), whereas E.U. investments were focused primarily on middle-tech sectors.<sup>24</sup> Over the last decade, Europe closed the gap in terms of raw private-sector investment, but continued to lag behind the U.S. in R&D funding and has actually fallen farther behind the U.S. in venture capital and early-stage funding.<sup>25</sup> In fact, whereas the E.U. ranked two percentage points above the U.S. in private investment as a percentage of GDP in 2022 (19.3% to 17.5%), the U.S. had substantially higher venture capital and early-stage investment as a percentage of GDP (0.7% compared to <0.1% in Germany).<sup>26</sup>

This access to seed capital has had a profound impact on the relative structure of the American, European, and Asian innovation economies by facilitating substantially more unicorns.<sup>27</sup> Available data suggest that over half of the 2,723 unicorns in existence in 2023 were headquartered in the U.S.<sup>28</sup> China was second with 348, the U.K. third with 147, and E.U. nations lagged substantially behind with Germany and France accounting for just 64 and 38, respectively.<sup>29</sup> Not only do unicorns leverage the dynamism of smaller startups to generate new ideas, but once they grow (or are acquired by an existing company), they are able to leverage the economic efficiencies associated with larger companies, further benefiting innovation and growth.<sup>30</sup>

Why does the U.S. maintain such an enduring investment advantage? First, the U.S. has well-developed financial markets. Second, the U.S. takes a substantially more democratic view towards individual investing. Compared to Europe, for example, household investment in capital markets is substantially higher in the U.S. E.U. households held 32% of their savings in cash or deposits and just 30% in shares and investment funds, whereas U.S. households placed 47% of their savings in equity or investment funds and just 13% in cash.<sup>31</sup> As a result, U.S. households free up substantial amounts of capital for investment in technology and innovation, which is unavailable in markets abroad.<sup>32</sup>

## THE RULE OF LAW AND ECONOMIC GROWTH

The rule of law and elimination of public corruption are strongly correlated with increased foreign direct investment (FDI).<sup>33</sup> Particularly in developed countries, the adoption of a transparent legal system that protects property and individual rights provides investors assurances when making long-term investments.<sup>34</sup> Poor institutions with corrupt and unpredictable legal and governmental systems increase uncertainty, risk, and the cost of doing business.<sup>35</sup>

The U.S. legal system has, traditionally, offered investors strong institutions that provide certainty regarding the legal protections afforded their investments. This certainty contributes to investment and growth. Two recent cases in the Northern District of Illinois shed light on the nature of these protections, and the seriousness with which the U.S. legal system treats intellectual property theft.

On January 13, 2025, the U.S. Attorney's Office for the Northern District of Illinois secured a guilty plea from Chinese telecommunications company Hytera for felony conspiracy to steal trade secrets from Illinois-based Motorola Solutions, Inc.<sup>36</sup> The criminal indictment arose out of ongoing civil litigation between Motorola and Hytera over claims that Hytera and its highest ranking employees conspired to induce Motorola employees to steal confidential documents and source code and then used these stolen materials to produce digital mobile radios in violation of U.S. law. A jury awarded Motorola \$764 million in damages for copyright infringement and trade secret misappropriation in 2020.<sup>37</sup> Remarkably, Hytera conceded liability on appeal and disputed only the amount of damages, which was, in fact, reduced slightly by the Seventh Circuit.<sup>38</sup> On remand, Motorola has successfully pursued contempt proceedings totaling over \$59 million in royalties and \$11 million in interest for Hytera's failure to pay the judgment owed and its continued sale of infringing products.<sup>39</sup> Meanwhile, the U.S. seeks \$60 million in fines and "full restitution" for Motorola for an additional \$290 million.<sup>40</sup>

In addition to their deterrent effect, the proceedings offer a compelling case study highlighting the benefits of the U.S. legal system. The procedural safeguards in the U.S. proceedings stand in stark juxtaposition to a declaratory judgment action filed by Hytera in China in an effort to avoid the U.S. judgment.<sup>41</sup> After the adverse verdict, but before entry of judgment in the Northern District of Illinois, Hytera introduced a new line of two-way radios, called its “H-Series,” which it asserted did not infringe Motorola’s rights.<sup>42</sup> Hytera then persuaded the District Court that contempt proceedings, rather than the faster post-trial motions process, were the proper mechanism to decide whether the H-Series radios infringed.<sup>43</sup> While the District Court considered whether the new radios violated the judgment, Hytera secretly filed a second action in the Shenzhen Intermediate People’s Court, seeking a preemptive declaratory judgment that the H-Series did not infringe Motorola’s trade secrets or copyrights.<sup>44</sup> The belated revelation of this “gratuitously duplicative and vexatious” Chinese litigation raised substantial due-process concerns because Hytera had failed to notify any of Motorola, the District Court, or the Seventh Circuit of its existence, and the Chinese court, which accepted the case in February 2023, did not serve process on Motorola until November 2023, over a year after Hytera filed the case.<sup>45</sup> During that time, the Chinese court and Hytera engaged in substantive *ex parte* communications.<sup>46</sup>

Hytera eventually withdrew its Chinese declaratory judgment action under threat of sanctions from the District Court, including a million-dollar-a-day fine and a worldwide injunction on the sale of all two-way radios,<sup>47</sup> but the contrast between the two proceedings provides a useful comparison. In the U.S. court, each party was informed of the other’s actions, with equal recourse to the arbiter. This afforded Hytera an opportunity to vindicate its rights fully, irrespective of its conceded bad acts. The procedural guardrails therefore contributed to a greater degree of confidence in the outcome of the proceedings. Conversely, the lack of transparency in the Chinese proceedings, including a yearlong series of *ex parte* communications between Hytera and the court, undermined the rule of law and decreased

confidence in the accuracy and fairness of any eventual ruling from the Chinese court.<sup>48</sup>

Thus, the U.S. legal system is particularly attractive to potential investors, as it ensures that they will have access to neutral, competent tribunals, regardless of which side of litigation they may find themselves.

## CONCLUSION

2026 marks the United States of America’s 250th anniversary. It also represents the continuation of the American legacy of innovation and technological development. America’s founders recognized that encouraging technological innovation was linked to protecting intellectual property. The Intellectual Property Clause (art. 1, § 8, cl. 8) of the U.S. Constitution gave Congress the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” This enshrined intellectual property protections in the Constitution and provided the framework for the U.S.’s intellectual property laws ever since.<sup>49</sup>

The U.S.’s 249th year has proven all but ordinary. Through a year of global instability, the U.S. has remained at the forefront of technological innovation. The institutions that established the country as a global leader, which trace their origins back to the nation’s own founding—namely dynamic financial markets, a transparent legal system, and the world’s preeminent institutions of higher learning—face new challenges. If the U.S. is to preserve its place atop the global hierarchy of innovation—as the country’s founders believed necessary for its long-term success—it must continue to preserve and protect these institutions, and guard them against assault.

## ENDNOTES

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His numerous honors include 100 Most Influential Lawyers in the United States every year since its inception; recognition by The National Law Journal as one of the Top Ten Trial Lawyers twice; the first Chambers USA Award for Excellence as the nation's Outstanding Intellectual Property Lawyer (2006); voted the top Super Lawyer in Southern California in a poll by Los Angeles magazine; and induction into the California State Bar Trial Lawyer Hall of Fame (2014). Fellow, American College of Trial Lawyers.

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Grant clerked for the Hon. Jay S. Bybee of the U.S. Court of Appeals for the Ninth Circuit.

1. The companies include: NVIDIA (U.S.), Apple (U.S.), Alphabet (U.S.), Microsoft (U.S.), Amazon (U.S.), Broadcom (U.S.), Saudi Aramco (Saudi Arabia), Meta Platforms (U.S.), Taiwan Semiconductor Manufacturing Co. (Taiwan), Tesla (U.S.), Berkshire Hathaway (U.S.), and Eli Lilly (U.S.). See *Largest Companies by Marketcap* (date) companiesmarketcap.com, <<https://companiesmarketcap.com/>> (as of Nov. 25, 2025); Daly, *The Largest Companies by Market Cap in November 2025* (Nov. 5, 2025) The Motley Fool <<https://www.fool.com/research/largest-companies-by-market-cap/>> (as of Jan. 5, 2026).
2. *Ibid.*
3. The U.S. GDP was \$30.62 trillion in 2025, nearly double that of China, the world's second largest economy (\$19.4 trillion). *GDP, current prices* (2025) International Monetary Fund <<https://www.imf.org/>

<external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEOORLD>> (as of Nov. 25, 2025).

4. Excluding so-called "tax-havens"—nations where entities choose to incorporate for tax advantages despite few or any other business activities there—the U.S. boasts a GDP per capita behind only Norway and Iceland. See, e.g., Lewis, *Tax Havens Make GDP Screwed* (June 11, 2018) Medium <<https://medium.com/@nslewis/tax-havens-make-gdp-screwed-c241430447d9>>.
5. See note 3, *ante*; see also *GDP per Capita by Country 2025* (Date) World Population Review <<https://worldpopulationreview.com/country-rankings/gdp-per-capita-by-country>> (as of Nov. 25, 2025). And while there are numerous methodologies for measuring individual incomes across different countries with different costs of goods, studies comparing OECD countries produce similar disparities between U.S. and global median income. See, e.g., OECD (2024) *Society at a Glance: OECD Social Indicators* <<https://doi.org/10.1787/918d8db3-en>> (as of date) (annual median equivalized disposable income, adjusted for purchasing power parity: U.S. (\$46,625), Germany (\$35,537), Canada (\$39,388), Italy (\$27,949)).
6. Toole et al., U.S. Patent and Trademark Office, *Intellectual property and the U.S. Economy* (3d ed. 2022) pp. 3, 5 (corresponding to 41% of the country's GDP and 45% of its workforce).
7. For example, the U.S. ranks near the top of countries both in terms of the percentage of the adult population with a postsecondary degree (51%) and with at least a secondary education (91%). See OECD, *Education at a Glance* (2024) p. 60 <<https://doi.org/10.1787/c00cad36-en>> (as of May 6, 2026).
8. Delgado & Murray, *How Some Universities Translate Inclusive Innovation into Regional Growth* (Winter 2025) 41 *Issues Sci. Tech.* 79–82 <<https://doi.org/10.58875/XOQE7787>> (as of May 6, 2026).
9. *Id.* at pp. 81–83 (finding that smaller universities in less economically productive regions played an outsized role in facilitating inventor activity and innovative growth, including in traditionally under-represented demographics).
10. The Times Higher Education World University Rankings have been conducted since 2004 and assess universities based on eighteen performance metrics, including teaching, research, and knowledge transfer, and include a substantial reputational component based upon survey data from what the organization dubs "a statistically representative distribution of scholars worldwide." Palmer, *Despite Reputation Drop, American Universities Remain Top-Ranked Globally* (Oct. 9, 2024) Inside Higher Ed <<https://www.insidehighered.com/news/global/us-colleges-world/2024/10/09/>

- us-universities-drop-reputation-remain-top-ranked#:~:text=U.S.%20still%20Dominates%20the%20Rankings&text=By%20country%2C%20the%20United%20States,Canada%2C%20South%20Korea%20and%20Switzerland> (as of May 6, 2026).
11. *Id.*
  12. Institute of International Education, *United States Hosts 1.2 Million International Students at Colleges and Universities, Totaling 6% of U.S. Higher Education* (Nov. 17, 2025) IIE.org <<https://www.iie.org/news/open-doors-2025-press-release/>> (United States Hosts).
  13. *Ibid.*; Institute of International Education, *International Students* (date) OpenDoorsData.org <<https://opendoorsdata.org/annual-release/international-students/#key-findings>> (as of Nov. 26, 2025). These proportions are significantly higher at the nation's top research institutions, where international students can make up over a quarter of the population. See, e.g., Richter, *Foreign Students Make Up 27% of Harvard's Enrollment*, Statista (May 23, 2025) <<https://www.statista.com/chart/34519/international-students-at-harvard-university/#:~:text=Like%20it%20did%20with%20previous,graduates%20living%20outside%20the%20U.S.&text=This%20chart%20shows%20the%20number,foreign%20students%20at%20Harvard%20University>> (Harvard, 27%); Yale Office of Institutional Research, *By the Numbers* (<<https://www.yale.edu/about-yale/yale-facts>> (as of May 6, 2026) (Yale, 28%); see also Badger et al., *These Are the U.S. Universities Most Dependent on International Students*, N.Y. Times (May 23, 2025) <<https://www.nytimes.com/2025/05/23/upshot/harvard-trump-international-students.html>>.
  14. *Ibid.*
  15. Strebulaev, *The Immigrant Edge: How Foreign-Born Entrepreneurs Drive America's Unicorn Boom*, Crunchbase News (May 13, 2025) <<https://news.crunchbase.com/venture/foreign-born-entrepreneurs-drive-americas-unicorn-boom-strebulaev-stanford/>>.
  16. *Ibid.*
  17. See, e.g., *President and Fellows of Harvard College v. United States Department of Homeland Security* (D.Mass., June 23, 2025) 788 F.Supp.3d 182, 209–211 (granting preliminary injunction against ban on entry of international students attending Harvard for violating the university's First Amendment rights in apparent retribution against campus viewpoints). Indeed, when balancing the equities, the court specifically acknowledged the “significant harms to the public interest stemming from the loss of its international students, including the consequences for STEM research and medical care in the community” before finding in favor of the university. *Id.* at p. 43.
  18. E.g., Flannery, *Trump Cancels Federal Research Grants. What Are the Consequences?* NEA News (May 27, 2025) <<https://www.nea.org/nea-today/all-news-articles/trump-cancels-federal-research-grants-what-are-consequences>>; Anderson, *New Immigration Rule Will End or Restrict Student Practical Training*, Forbes (Nov. 11, 2025) <<https://www.forbes.com/sites/stuartanderson/2025/11/11/new-immigration-rule-will-end-or-restrict-student-practical-training/>>.
  19. See United States Hosts, *supra* (1% decline in fall student enrollment but 14% increase in first-year graduates entering the U.S. workforce through the Optional Practical Training program). Scholars have also heavily discussed the 17% year-over-year decline in new international enrollments at U.S. universities. See Faguy, *New International Student Enrolment Drops 17% at U.S. Universities*, BBC (Nov. 17, 2025) <<https://www.bbc.com/news/articles/cy8v336lyz4o>>. While this statistic is concerning, it is worth noting that new enrollments can fluctuate yearly, including a 7% decline between 2023 and 2024, despite overall enrollment growth. United States Hosts, *supra*.
  20. Richards, *Trump Calls H-1B Visas Necessary to Bring in “Certain Talents” He Says the U.S. Lacks*, NBC News (Nov. 11, 2025) <<https://www.nbcnews.com/politics/immigration/trump-calls-h-1b-visas-necessary-bring-certain-talents-says-us-lacks-rcna243367>>; Nath, *‘Foreign Students Good for US’: Trump’s U-Turn on MAGA’s Immigration Agenda*,” NDTV World News (Nov. 12, 2025) <<https://www.ndtv.com/world-news/donald-trumps-u-turn-on-magas-immigration-agenda-foreign-students-good-for-us-9619294>> (“You don’t want to cut half of the people, half of the students from all over the world that are coming into our country—destroy our entire university and college system—I don’t want to do that”).
  21. Palmer, *supra*.
  22. Kortum & Lerner, *Assessing the Contribution of Venture Capital to Innovation* (2000) 31 *Rand J. Econ.* 674, 689 (2000) (finding that venture capital spending contributed between 1.5x and 3x more to innovation growth than R&D spending generally).
  23. (R&D). In the mid-2000s, for example, R&D financed by the business sector constituted just 1% of E.U. GDP, compared to over 1.5% of U.S. GDP. Cite. And, while the private sector funded 64% of total R&D in the US, it funded just 55% in the E.U. Runiewicz-Wardyn, *Evaluating and Comparing the Innovative Performance of the United States and the European Union*, Minda de Gunzburg Center for European Studies, Harvard University, Working Paper Series #172 (2009) at pp. 10–11. A similarly stark difference could be found in venture capital funding, with U.S. venture capital investment 40% higher relative to GDP than in

- Europe and 64% higher when considering early-stage investment alone. *Id.* at p. 12.
24. *Id.* at p. 11. “Middle” or “mid-tech” includes cars and industrial machinery, as well as certain chemicals and telecommunications systems. As a general matter, middle-tech sectors produce less innovation and slower growth. See Dietrich et al., *Europe’s Middle-Technology Trap* (2024) 25 *EconPol Forum* 32, 33–35.
  25. As of 2022, the U.S. (3.46%) remained substantially ahead of both the E.U. (2.24%) and China (2.41%) in R&D spending as a percentage of GDP. Arnal & Feas, Real Instituto Elcano, *Competitiveness: The Widening Gap Between the EU and the US* (2024) ARI 139, at pp. 5–7 <<https://www.realinstitutoelcano.org/en/analyses/competitiveness-the-widening-gap-between-the-eu-and-the-us/>>. That being said, the E.U. has narrowed the gap in public R&D spending as percentage of GDP (3.5% in the U.S. to 3.2% in the E.U., down from a gap of almost a percentage point in 2008). *Id.* at 10. Regardless, the U.S. dwarfs all other countries in R&D spending in absolute terms. See Dietrich et al., note 22, *ante* at p. 32 (U.S.: £730 billion in 2021; E.U.: £322 billion in 2021).
  26. Indeed, the U.S. even had nearly double the venture capital investment of Estonia, the EU-member state with the highest venture capital investment as a percentage of its GDP. See *id.* at pp. 5–7.
  27. *Id.* at p. 7.
  28. *Id.* at p. 9.
  29. *Ibid.*
  30. Tellingly, compared to the U.S., the E.U. and other world countries lag behind in numbers of larger, more productive companies as well. *Id.* at pp. 7, 25–26. The U.S.’s superior regulatory framework provides at least one additional factor contributing to the country’s dominance in numbers of both the largest and most dynamic companies. See *id.* at p. 25 (“Some studies highlight the role of excessive European regulation as the key element in the productivity gap with the US.”). One fundamental fact remains, however: the U.S. remains a substantially friendlier environment for early-stage growth and innovation, with recent studies indicating that companies which relocated to the U.S. were substantially more likely to achieve the growth necessary to qualify as “unicorns.” See Strebulaev, *supra* (Israeli startups 9x more likely; Indian startups, 6.5x; U.K. startups, 2.5x).
  31. *Id.* at pp. 9–10.
  32. *Ibid.*
  33. This relationship is particularly strong in developed countries—that is, when a country is developed, the relative strength of institutions and the rule of law plays a stronger role in encouraging investments. See Sabir et al., *Institutions and FDI: Evidence from Developed and Developing Countries* (2019) *Fin. Innovation* at p.10.
  34. *Id.* Importantly, this is entirely independent of the notion that strong intellectual property protections themselves—that is, laws favoring patentees—facilitate economic growth; though, empirical studies suggest that stronger intellectual property protections do just that. See, e.g., Falvey et al., United Nations Industrial Development Organization (UNIDO), *The Role of Intellectual Property Rights in Technology Transfer and Economic Growth* (2006) at p. 45 (“For the advanced countries, the evidence . . . suggests that strengthening IPRs raises growth, and later sections indicate that this at least partly comes about through increased innovation, as shown by increases in domestic patenting, and technology diffusion, as shown by increases in foreign patenting.”).
  35. Sabir et al., *supra*, at p. 2.
  36. *United States v. Hytera Communications Corporation* (N.D.Ill Jan. 13, 2025, No. 1:20-cr-688, Dkt. No. 353).
  37. *Motorola Solutions, Inc. v. Hytera Communications Corporation* (7th Cir. 2024) 108 F.4th 458, 468–469.
  38. *Ibid.* Significantly, the Seventh Circuit also determined that the Defense of Trade Secrets Act (DTSA) has extraterritorial reach, an issue that is sure to be litigated further in the other circuits. *Id.* at pp. 481–484.
  39. *Motorola Solutions., Inc. v. Hytera Communications Corporation* (N.D.Ill. 2025) 799 F.Supp.3d 681.
  40. *United States v. Hytera Communications Corporation* (N.D.Ill., Nov. 3, 2025, No. 1:20-cr-688, Dkt. No. 363) at p. 49.
  41. *Motorola Solutions., Inc. v. Communications Corporation* (7th Cir. Apr. 6, 2024, No. 24-1531, Dkt. 9) at pp. 2–4.
  42. *Ibid.*
  43. *Ibid.*
  44. *Ibid.*
  45. *Ibid.*
  46. *Ibid.*
  47. *Motorola Solutions, Inc. v. Communications Corporation* (7th Cir. Apr. 16, 2024, No. 24-1531, Dkt. No. 24) at pp. 6–8.
  48. See, e.g., *Motorola Solutions.* (No. 24-1531, Dkt. No. 9) at pp. 2–4.
  49. Heinrich & Abernethy, *The Myriad Reasons to Hit “Reset” on Patent-Eligibility Jurisprudence* (May 22, 2014) 47 *Loyola L.A. L. Rev.* 117, 122–123.

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# APPEALS AND WRITS

## U.S. SUPREME COURT

### TEMPORARY RESTRAINING ORDER WITH HALLMARKS OF PRELIMINARY INJUNCTION IS IMMEDIATELY APPEALABLE

In general, a temporary restraining order in federal court is not a final, appealable order—the parties must await a preliminary injunction.<sup>1</sup> But the U.S. Supreme Court has significantly narrowed that rule in the context of litigation challenging the Trump Administration’s terminations of grants and other federal funding streams.

In an order entered on its emergency docket, the court held in *Department of Education v. California* that the TRO the district court had entered in that case was appealable because it was tantamount to a preliminary injunction.<sup>2</sup> This case involved states’ claims under the Administrative Procedure Act that the Department of Education unlawfully terminated certain grants for teacher-training programs. The district court granted a TRO and required the government to pay past-due grant obligations and to continue payments as they accrued. The government appealed and moved to stay the district court proceedings pending appeal, but the First Circuit denied the motion.<sup>3</sup>

The U.S. Supreme Court reversed. The court determined the “the District Court’s order carrie[d] many of the hallmarks of a preliminary injunction” and was appealable on that basis.<sup>4</sup> The court did not elaborate significantly on that rationale, but appears to have been swayed by the fact that the TRO required the payment of funds and that there had been an adversarial hearing in the district court (in contrast to an *ex parte* TRO).<sup>5</sup> It remains to be seen whether this reflects a change in the law that applies outside the unique context of litigation challenging federal grant terminations.

## LITIGANTS WHO FILE A NOTICE OF APPEAL AFTER ORIGINAL DEADLINE NEED NOT FILE A SECOND NOTICE AFTER REOPENING

In federal court, a late notice of appeal in a civil case is a jurisdictional defect—but a district court may reopen the time to appeal in certain circumstances.<sup>6</sup> What happens if a litigant files a late notice of appeal, the district court grants reopening, but the litigant fails to file a timely second notice? That might sound like an unusual scenario, but it gave rise to a circuit conflict that the U.S. Supreme Court agreed to resolve in *Parrish v. United States*.<sup>7</sup> Here, a federal inmate sought damages under the Federal Tort Claims Act for allegedly being wrongly placed in segregated custody. The district court entered judgment dismissing the case, but, because plaintiff had been transferred from federal custody to a state penitentiary, he did not receive the court’s order until well after his deadline to appeal. The Fourth Circuit treated the notice of appeal as a motion to reopen the time to file an appeal, ordering the district court to do so. But plaintiff then failed to file a timely second notice of appeal, and the Fourth Circuit held that it lacked jurisdiction to hear his case.<sup>8</sup>

The U.S. Supreme Court disagreed, reasoning that “[p]recedent teaches that a premature notice of appeal, if otherwise adequate, relates forward to the date of the order making the appeal possible.”<sup>9</sup> Thus, “[w]hen a district court grants reopening to a litigant who has already filed a notice making his intent to appeal clear, no second notice of appeal is required.”<sup>10</sup>

## VOLUNTARY DISMISSAL UNDER FEDERAL RULES OF CIVIL PROCEDURE, RULE 41(A) CONSTITUTES A “FINAL PROCEEDING” UNDER RULE 60(B)

Federal Rules of Civil Procedure, rule 60(b) allows district courts to “relieve a party or its legal representative from a final judgment, order, or proceeding” in certain circumstances. In *Waetzig v. Halliburton Energy Services, Inc.*, the U.S. Supreme Court considered whether a party’s voluntary dismissal under Federal Rules of Civil Procedure,

rule 41(a) counts as a “final proceeding” for purposes of rule 60(b).<sup>11</sup>

The court held that it did, rejecting the respondent’s argument that the term “final” in rule 60(b) should be construed to mean essentially what it means in jurisdictional statutes like 28 U.S.C. § 1291, providing for appellate review of final judgments.<sup>12</sup> The court reasoned that the discretionary relief offered under rule 60(b) is “[u]nlike an appeal filed under the appellate jurisdiction statute.”<sup>13</sup> Among other things, the court explained, “a motion for relief under Rule 60(b) is discretionary, not ‘a matter of statutory right,’” and there is “no reason to fear that Rule 60(b) will be abused” to delay proceedings.<sup>14</sup> Accordingly, the court declined to “import the understanding of finality that applies in the field of appellate jurisdiction” to rule 60(b).<sup>15</sup>

## U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

### THE NINTH CIRCUIT MAINTAINS BROAD JURISDICTION OVER ORDERS REGARDING PRIOR PRELIMINARY INJUNCTIONS

In two 2025 cases, the Ninth Circuit addressed its jurisdiction to review district court injunctions. The court held in *Simon v. City & County of San Francisco*<sup>16</sup> and *Las Vegas Sun, Inc. v. Adelson*,<sup>17</sup> that it had jurisdiction to review such injunctions on the facts of those cases.

In *Simon*, the court considered an appeal from the district court’s order enjoining a county sheriff from enforcing search conditions set forth in a prior superior court injunction.<sup>18</sup> The Ninth Circuit rejected plaintiffs’ argument that it lacked jurisdiction over appeals of orders in which the district court merely enforces or interprets a previous injunction, reasoning that the order being appealed both modified and expanded the earlier injunction. Because the district court’s order went beyond mere enforcement of a previous preliminary injunction imposed by the superior court, the Ninth Circuit concluded that it maintained appellate jurisdiction.<sup>19</sup>

In *Las Vegas Sun*, the court similarly held that an order expressly refusing to dissolve an existing preliminary injunction is appealable under 28 U.S.C. § 1292(a)(1).<sup>20</sup> The case involved a stipulated order in lieu of litigating an anticipated motion for preliminary injunction preventing the termination of an agreement. The order clarified that the defendants could later take judicial steps to terminate the agreement. The district court denied defendants' motion to dissolve the preliminary injunction, and defendants appealed. Plaintiff argued the Ninth Circuit lacked jurisdiction, but the court disagreed. It reasoned because the district court's order "explicitly denied an express request to dissolve an injunctive order, Defendants' appeal of that denial [fell] squarely within the language of section 1292(a)(1)."<sup>21</sup>

## WHAT ORDERS ARE APPEALABLE? ANTI-SLAPP MOTIONS, STAYS, AND MORE

### NO LONGER IMMEDIATELY APPEALABLE (IN FEDERAL COURT): DENIAL OF ANTI-SLAPP MOTION TO STRIKE

In *Gopher Media LLC v. Melone*, a unanimous en banc Ninth Circuit panel overruled its prior decision in *Batzel v. Smith* and held that a district court's denial of an anti-SLAPP motion to strike under California law is *not* immediately appealable in federal court under the collateral order doctrine.<sup>22</sup> The panel reasoned because such orders do not resolve issues "completely separate from the merits of the action," and do not render the decision "effectively unreviewable on appeal from a final judgment," they do not satisfy the requirements of the doctrine.<sup>23</sup>

The panel limited the effect of its ruling in several ways. First, it clarified that the decision did not displace a district court's ability to certify an issue for interlocutory appeal under 28 U.S.C. § 1292(b).<sup>24</sup> Second, it specified that its reasoning applied only to motions brought under California's anti-SLAPP statute (though the implication of the court's reasoning may well ultimately reach similar laws in other states). And third, while dueling concurring opinions debated whether state anti-SLAPP laws should apply in federal court at all, the majority

opinion declined to address that issue, which was not squarely presented in the case.<sup>25</sup>

It is worth noting that in California state court, a trial court's denial of an anti-SLAPP motion is immediately appealable, as the anti-SLAPP statute provides.<sup>26</sup> But that state procedural rule does not apply in federal court under the *Erie* doctrine.<sup>27</sup> This difference between anti-SLAPP litigation in federal and state court—along with other differences, such as the absence of an automatic discovery stay and heightened pleading standard in federal court—makes it incumbent on attorneys to think strategically about the best forum in which to litigate anti-SLAPP matters for their clients.<sup>28</sup>

### IMMEDIATELY APPEALABLE: ORDER IMPOSING NATIONWIDE STAY

In *Immigrant Defenders Law Center v. Noem*, the Ninth Circuit addressed appealability in context of the government's appeal of a district court order imposing a nationwide stay of reimplementation of "Remain in Mexico" policy.<sup>29</sup> Here, the district court granted immigrant rights organizations and individuals' application for a nationwide stay of the reimplementation of the policy, which requires migrants seeking asylum at southern border to remain in Mexico pending adjudication of their asylum proceedings.<sup>30</sup>

The Ninth Circuit applied the three-factor appealability analysis set forth in *Carson v. American Brands, Inc.*<sup>31</sup> First, the court determined the district court's stay under 5 U.S.C. § 705 carried the same practical effects as a preliminary injunction.<sup>32</sup> Second, the Ninth Circuit reasoned that the § 705 stay interfered with the court's ability to effectuate a statute duly enacted by Congress, which constitutes a cognizable "form of irreparable injury."<sup>33</sup> Third, the court concluded district court's stay could be effectively challenged only by an immediate appeal given the risks of harm to the government. Accordingly, the Ninth Circuit held the order granting the nationwide stay was immediately appealable.<sup>34</sup>

## SOMETIMES IMMEDIATELY APPEALABLE: ORDER GRANTING PARTIAL SUMMARY JUDGMENT

*Montana Wildlife Federation v. Haaland* presented a question about the appealability of an order granting partial summary judgment.<sup>35</sup> *Montana Wildlife* involved ten separate appeals seeking review of orders from district courts in Idaho and Montana granting partial summary judgment to plaintiffs challenging oil and gas leases on federal land. At the outset, the court confronted the question whether it had jurisdiction to review the orders.<sup>36</sup>

Grants of partial summary judgment are typically not immediately appealable because they “do[] not dispose of all claims.”<sup>37</sup> But orders granting or denying injunctions are appealable under 28 U.S.C. § 1292(a)(1), so the court examined whether the two district court orders on review had “the practical effect of entering an injunction.”<sup>38</sup> The court concluded the orders met that standard because their practical effect was to cancel oil and gas leases and return funds to the lessees, which was tantamount to injunctive relief.<sup>39</sup>

## PRIOR EN BANC PANEL HAS STATUTORY AUTHORITY TO HEAR SUBSEQUENT APPEALS IN SAME CASE, EVEN WITH NOW-SENIOR JUDGES

*Duncan v. Bonta*, a closely watched Second Amendment case, presented an interesting question regarding the operation of the Ninth Circuit’s en banc procedures.<sup>40</sup> In a prior appeal in the same case, the court voted to rehear the case en banc.<sup>41</sup> The court rejected plaintiff’s challenge to a California law prohibiting large-capacity magazines,<sup>42</sup> but the U.S. Supreme Court ultimately vacated that decision and remanded for further consideration in light of *New York State Rifle & Pistol Association v. Bruen*.<sup>43</sup> The district court held the law violated the Second Amendment, and the state appealed.<sup>44</sup>

When the case returned to the Ninth Circuit, the en banc court chose, pursuant to Ninth Circuit General Order 3.6(b), to hear the appeal as a “comeback” case, even though multiple judges on the en banc panel had taken senior status in the interim.<sup>45</sup> General Order 3.6(b) addresses “comeback” cases,

providing that matters arising after remand may be decided by the en banc court that previously heard the case. In his dissent, Judge Ryan D. Nelson cautioned that most circuits apply 28 U.S.C. § 46(c) to require a new en banc vote in a new appeal.<sup>46</sup> Judge Nelson characterized the majority’s decision as “a misuse even of our own rules[,]” noting that “[n]ever before has a court allowed five senior judges to control an en banc decision on behalf of the court’s active judges.”<sup>47</sup> But the majority was not swayed. As of November 2025, a cert petition in the case is pending in the U.S. Supreme Court, though it does not seek the Court’s review of the Ninth Circuit’s application of General Order 3.6(b).

## PROCEDURAL AND JURISDICTIONAL QUESTIONS IN IMMIGRATION APPEALS

Immigration appeals remain a large part of the Ninth Circuit’s docket and in 2025, the court resolved at least two important immigration-specific procedural and jurisdictional questions.

In *Perez-Perez v. Bondi*, the court concluded that a petition seeking review of a decision of the Board of Immigration Appeals using “A” numbers, rather than given names, for lead petitioner’s wife and minor children, provided sufficient notice to the government of the identities of the petitioners seeking review and thus met the requirements of Federal Rule of Appellate Procedure 15(a)(2)(A).<sup>48</sup> Rejecting the government’s request to amend the petition to omit the “unnamed” petitioners, the Ninth Circuit reasoned that although the rule requires petitions “name each party,” the purpose of the rule is provide notice. The court concluded that inclusion of “A” numbers in place of party names do just that, as they correspond to specific persons who have raised claims before the agency and whose names are readily available in the government’s own records.<sup>49</sup>

In *Lemus-Escobar v. Bondi*, the Ninth Circuit had the opportunity to clarify the jurisdictional rules governing challenges to denials of cancellations of removal, following several recent U.S. Supreme Court decisions.<sup>50</sup> The court held it has jurisdiction

to review the step-one determinations of statutory eligibility, including hardship determinations, by the Board of Immigration Appeals because those determinations present “questions of law” under 8 U.S.C. § 1252(a)(2)(D).<sup>51</sup> But the court clarified that it still lacked jurisdiction to review purely factual findings as well as purely discretionary determinations, such as the agency’s step-two determination that it would deny cancellation as a matter of discretion.<sup>52</sup>

## UNTIMELY NOTICES OF APPEAL

The timeliness of notices of appeal is an issue of perennial interest to appellate practitioners, and one that the Ninth Circuit addressed in multiple cases this year.

In *McNeil v. Gittere*, an incarcerated prisoner filed a claim under 42 U.S.C. § 1983, alleging that prison officials denied him access to key evidence before a disciplinary hearing.<sup>53</sup> The district court denied the prison official defendants’ motion for summary judgment based on qualified immunity.<sup>54</sup>

The prison officials sought to appeal, but the Ninth Circuit dismissed for lack of jurisdiction because the notice of appeal—filed 150 days after the order—exceeded the 30-day deadline under 28 U.S.C. § 2107(a) for collateral orders denying qualified immunity.<sup>55</sup> Defendants argued the 150-day time limit under Federal Rules of Appellate Procedure, rules 4(a)(7)(A) and 58(a) applied because the district court did not enter judgment denying qualified immunity in a “separate document.”<sup>56</sup> The Ninth Circuit disagreed. It reasoned that the 30-day deadline under section 2107(a) applied and to the extent the rules allow more time, they conflict with the statute, and are thus invalid.<sup>57</sup> Under the plain meaning of statute’s language, “entry” of an immediately appealable collateral order occurs when the district court files the order on the civil docket, and defendants’ appeal was untimely.<sup>58</sup>

On the heels of that decision, the Ninth Circuit decided *Rajabian v. Mercedes-Benz USA, LLC*.<sup>59</sup> The district court stayed the federal case under the

*Colorado River* doctrine, deferring to the parallel state court proceedings, and when a party later sought to lift the stay, the district court declined.<sup>60</sup> On appeal, the Ninth Circuit dismissed as untimely the challenge to the original stay because the 30-day appeal period under Federal Rule of Appellate Procedure, rule 4(a)(1)(A) for final appealable orders, like orders staying federal cases under the *Colorado River* doctrine, had expired.<sup>61</sup> The text-only minute order qualified as a “separate document” because it signaled the matter was fully closed, and therefore triggered the 30-day clock and plaintiffs’ notice of appeal was untimely as to the initial stay.<sup>62</sup>

## CALIFORNIA SUPREME COURT

### COMING SOON: APPEALABILITY OF VOLUNTARY DISMISSALS WITH PREJUDICE

The California Supreme Court granted review of the Fourth District Court of Appeal’s opinion in *Maniago v. Desert Cardiology Consultants’ Medical Group, Inc.*<sup>63</sup> to address a question that has long vexed attorneys and courts: Is a voluntary dismissal with prejudice an appealable order if it was entered after an adverse ruling by the trial court in order to expedite an appeal of the ruling? The answer is likely yes—so long as the attorney follows the correct procedure.

In *Maniago*, the trial court sustained demurrers as to most claims (with leave to amend) and struck punitive damages allegations, but it left at least one claim for each plaintiff pending. Rather than amending, plaintiffs voluntarily dismissed their entire action with prejudice, intending to expedite an appeal of the adverse (but non-final) rulings on the demurrer and motion to strike. The Court of Appeal dismissed the appeal for lack of jurisdiction, reasoning that a voluntary dismissal of the entire action with prejudice, entered by the clerk at the plaintiffs’ request before a final judicial resolution of all claims, was not an appealable final judgment.<sup>64</sup>

The appellate court distinguished *Stewart v. Colonial Western Agency, Inc.*<sup>65</sup> and similar cases that concluded a voluntary dismissal with prejudice is appealable if it follows an adverse ruling intended

to expedite appeal.<sup>66</sup> In those cases, the trial court had “made a final determination adverse to the plaintiff on some but not all claims,” but the plaintiffs voluntarily dismissed *only* the remaining claims, at which point they were able to appeal “the final judgment of dismissal entered by the court” on the initial claims.<sup>67</sup> In *Maniago*, by contrast, the plaintiffs “voluntarily dismissed their entire action with prejudice then sought to appeal the resulting dismissal.”<sup>68</sup> That subtle difference changed the outcome, because “the clerk’s entry of the voluntary dismissal” of the entire case “is a ministerial act from which no appeal lies.”<sup>69</sup>

The Supreme Court’s eventual decision in this case can be expected to clarify matters. For now, practitioners should be careful to comply with *Maniago*’s bright-line rule requiring a final judgment *entered by the court* after a voluntary dismissal with prejudice of only the claims the trial court *failed to resolve*—not a voluntary dismissal of the entire action.

### **UNLESS THE APPELLATE COURT SPECIFICALLY ORDERS OTHERWISE, A TEMPORARY STAY IN WRIT PROCEEDINGS REMAINS IN EFFECT UNTIL THE REMITTITUR IS ISSUED**

The California Supreme Court in *People v. Superior Court (Mitchell)* clarified the duration and effect of a temporary stay ordered by an appellate court in writ proceedings.<sup>70</sup> Although the issue arose in a criminal case, the same issue could potentially arise in civil litigation.

After the trial court entered a ruling reducing a felony charge to a misdemeanor, the government sought a writ of mandate. The Court of Appeal temporarily stayed further proceedings in the trial court and issued an order to show cause.<sup>71</sup> The court later granted the writ in a published opinion.<sup>72</sup> The defendant petitioned for review in the Supreme Court. While the petition for review was pending, the trial court resumed criminal proceedings at the prosecution’s request.<sup>73</sup>

The Supreme Court held that the trial court’s actions violated the temporary stay issued by the appellate court.<sup>74</sup> The court explained that a temporary stay remains in effect according to its terms or until the appellate opinion becomes final and remittitur issues.<sup>75</sup> The court emphasized that where the Court of Appeal’s opinion is silent regarding the stay, as was the case here, and no other order directs its dissolution, the stay remains in effect until the proceedings in the Court of Appeal have concluded.<sup>76</sup> The appellate opinion is “not the writ itself,” and it has “no effect” until remittitur issues.<sup>77</sup> Thus, the Supreme Court found that the trial court improperly resumed the criminal proceedings in violation of the stay, before remittitur was issued, rendering its subsequent orders void for lack of jurisdiction.<sup>78</sup>

The case is a helpful reminder that an appellate court’s issuance of a remittitur has real legal consequences; it is not just a formality.

### **CALIFORNIA PUBLIC UTILITIES COMMISSION DECISIONS NOW SUBJECT TO INDEPENDENT COURT REVIEW**

Although not strictly an appellate procedure case, the California Supreme Court’s decision in *Center for Biological Diversity v. Public Utilities Commission* is a potentially significant state administrative law decision regarding standards of appellate review.<sup>79</sup> The court unanimously rejected the decades old “uniquely deferential” standard of review previously applied to California Public Utilities Commission (CPUC) decisions interpreting the Public Utilities Code.

Since its *Greyhound* decision in 1968, the Supreme Court had followed a rule that the CPUC’s interpretations of statutes were “not to be disturbed unless it fails to bear a reasonable relation to statutory purposes and language.”<sup>80</sup> This level of deference raised a constitutional separation-of-powers concern, effectively giving the agencies, rather than the courts, the “final responsibility for interpreting statutes.”<sup>81</sup>

The Supreme Court in *Center for Biological Diversity* rejected the *Greyhound* standard, holding that when reviewing CPUC decisions involving the interpretation of the Public Utilities Code, courts must independently interpret the Code rather than “unduly” defer to the CPUC’s interpretation. The decision thus reaffirms that courts “remain the final arbiters of statutory meaning.”<sup>82</sup> But it does not reject deference to agencies entirely. Rather, the Supreme Court determined that CPUC interpretations should receive the same level of deference as those of other state agencies. Under the well-established *Yamaha* standard,<sup>83</sup> an agency’s interpretation of a statute “is entitled to consideration and respect by the courts,” and may in some cases receive “great weight” as “among several tools available to the court”—but the court remains the final arbiter.<sup>84</sup>

## AMENDMENTS TO POLICIES AND PAYMENT GUIDELINES FOR APPOINTED COUNSEL IN CAPITAL CASES

To ensure inmates sentenced to death receive adequate legal representation, the California Supreme Court is authorized to appoint counsel to represent defendants in automatic appeals from a judgment of death, in death penalty-related habeas corpus proceedings, and in other postconviction proceedings arising out of a judgment of death. Recent legislative developments, including the passage of Proposition 66 (the Death Penalty Reform and Savings Act of 2016)<sup>85</sup> and the California Racial Justice Act of 2020,<sup>86</sup> prompted the Court in 2025 to update its policies and guidelines governing these appointments.

Proposition 66 shifted the primary responsibility for appointing habeas corpus counsel from the Supreme Court to the sentencing court.<sup>87</sup> The Racial Justice Act allows defendants to challenge their convictions or sentences on the ground that racial bias affected their criminal proceedings.<sup>88</sup>

In January 2025, the Supreme Court approved amendments to its policies and payment guidelines. These amendments incorporate Proposition 66 and

the Racial Justice Act and clarify both the standards for appointing habeas corpus counsel and the compensation available for such appointments.<sup>89</sup> These amended policies and payment guidelines took effect on February 1, 2025.<sup>90</sup>

In June 2025, the Supreme Court approved a temporary amendment to the payment guidelines, effective through June 30, 2026, that allows habeas corpus counsel appointed before July 1, 2023, to seek and obtain permission to receive compensation for attorney fees and investigative expenses incurred in representing inmates raising claims under the Racial Justice Act.<sup>91</sup> The court also approved a revision to its policies that clarifies the scope of representation and payment obligations when a capital defendant is resentenced or their sentence is commuted to a term less than death.<sup>92</sup> Both the temporary amendment and the revised policy took effect on July 1, 2025.<sup>93</sup>

## CALIFORNIA SUPREME COURT FORMALIZES E-FILING RULES FOR ALL APPELLATE PROCEEDINGS

Before the COVID-19 pandemic, documents in cases accepted for review by the California Supreme Court were generally excluded from electronic filing.<sup>94</sup> During the pandemic, the court expanded mandatory e-filing to include all documents, including briefs, during events such as “natural disasters, public health emergencies, and other situations substantially affecting the court’s operations.”<sup>95</sup> Self-represented litigants and trial courts were exempt from the mandatory e-filing requirement, but any party could request an exemption.<sup>96</sup>

Effective August 13, 2025, the Supreme Court adopted amendments to formalize these pandemic-era e-filing guidelines.<sup>97</sup> Under the amended rules, all documents in all proceedings before the Supreme Court and Court of Appeal must be filed electronically through the TrueFiling platform, regardless of case type. E-filing remains optional for self-represented litigants and trial courts and parties may still seek exemptions from this requirement.<sup>98</sup>

# CALIFORNIA COURT OF APPEAL

## ATTORNEY DISCIPLINE

It was an unusually busy year for published opinions in the California Court of Appeal featuring attorneys behaving badly.

### ATTORNEYS MUST READ AND VERIFY AI CITATIONS

*Noland v. Land of the Free, L.P.* serves as a warning that briefs and other filings should not “contain any citations—whether provided by generative AI or any other source—that the attorney responsible for submitting the pleading has not personally read and verified.”<sup>99</sup> Here, generative AI hallucinated “nearly all of the legal quotations in plaintiff’s opening brief” and many in the reply brief.<sup>100</sup> While most of the cases existed, the quoted passages did not. Other citations did not support the stated propositions and some citations were to nonexistent cases.<sup>101</sup> Counsel admitted he relied on AI to draft the briefs but claimed that he failed to detect the hallucinations because “he did not read the cases the AI tools cited.”<sup>102</sup>

The court imposed sanctions because “it is a fundamental duty of attorneys to *read* the legal authorities they cite in appellate briefs.”<sup>103</sup> Being unaware of AI’s propensity to hallucinate is no excuse. AI’s propensity to hallucinate has been addressed in case law, the media, and State Bar guidelines on the use of AI.<sup>104</sup> Those guidelines provide that lawyers “must ‘critically review, validate, and correct both the input and the output of generative AI’ to, among other things, ‘detect[] and eliminat[e] . . . false AI-generated results.’”<sup>105</sup>

The court imposed a “conservative” monetary sanction of \$10,000, directed counsel to serve the opinion on his client, and directed the clerk to notify the bar.<sup>106</sup> The court declined to award sanctions to opposing counsel because they did not alert the court to the hallucinations.<sup>107</sup> Although the appellant’s reliance on nonexistent authority would have justified striking the brief or dismissing the appeal, the court reached the merits and

affirmed the order granting summary judgment for the respondent.<sup>108</sup>

### APPELLATE BRIEFS SHOULD NOT MAKE UNSUPPORTED ATTACKS ON THE TRIAL COURT’S MOTIVES

In *In re M.V.*, the Court of Appeal faulted the appellant’s appointed counsel for filing a brief that impugned the trial court’s motives without evidentiary support.<sup>109</sup> The appeal challenged a juvenile court’s order terminating parental rights.<sup>110</sup> Appointed counsel for the mother filed a brief that amounted to “little more than a screed against the juvenile court.”<sup>111</sup>

The brief advanced “overheated” arguments which accused the juvenile court of refusing to apply the law and manipulating the parties to achieve a “preconceived goal.”<sup>112</sup> These arguments lacked “support in the record” and “lurched off the path of discourse and into the ditch of abuse.”<sup>113</sup> “When made without evidentiary support, accusations that a judicial officer intentionally refused to follow and apply the law constitute reportable misconduct.”<sup>114</sup> The appellate court referred the opinion to the organization overseeing the mother’s appointed counsel to determine appropriate action.<sup>115</sup>

### ATTORNEYS MAY BE SANCTIONED FOR APPEALING NON-APPEALABLE DISCOVERY ORDERS AND MAKING FORFEITED AND CONTRADICTORY ARGUMENTS

In *Morales v. City and County of San Francisco*, the court sanctioned an appellant’s counsel \$30,000 for pursuing a frivolous appeal.<sup>116</sup> Two of the three orders on appeal involved discovery sanctions of less than the \$5,000 threshold necessary to trigger an appeal under Code of Civil Procedure section 904.1, subdivision (a)(12).<sup>117</sup> The court rejected appellant’s argument to “combine the two sanction orders” and aggregate their amounts to reach the minimum.<sup>118</sup> With respect to the sole appealable order, appellant raised forfeited arguments, directly contradicted positions taken before the trial court, and “asserted facts belied by the record below.”<sup>119</sup>

The court found not only objective frivolousness, but also subjective frivolousness because the complete

lack of merit suggested that the appeal was filed simply to harass respondent.<sup>120</sup> When determining the amount of sanctions and electing to impose sanctions against counsel alone, the court noted that counsel had “numerous opportunities to dismiss the appeal and to withdraw its baseless claims” but failed to do so.<sup>121</sup>

#### **COURT OF APPEAL MAY ACT ON ITS OWN MOTION TO DEEM A SELF-REPRESENTED PARTY A VEXATIOUS LITIGANT**

Under Code of Civil Procedure section 391, subdivision (b)(1), a litigant may be deemed vexatious if they have commenced, prosecuted, or maintained five litigations determined adversely in the previous seven years. In *Marriage of Kouwabina and Veltman*, the Court of Appeal acted on its own motion to deem a self-represented attorney a vexatious litigant after she pursued nine litigations determined adversely to her in the previous five years.<sup>122</sup> The court also rejected the attorney’s argument that some of the matters should not count toward section 391’s five-matter threshold because they arose from her efforts to defend herself against the other party’s claims.<sup>123</sup> A defendant’s appeal can “constitute ‘litigation’ under section 391(b)(1).”<sup>124</sup>

#### **FOOTNOTES AND FORFEITURE**

In *Sandhu v. Board of Administration*, the Third District reaffirmed that arguments raised only in footnotes and not in the body of the appellate briefs are forfeited.<sup>125</sup> While receiving contributions from Public Employees’ Retirement System,<sup>126</sup> appellant worked for a private company that assigned him to work at multiple public agencies who contracted with CalPERS.<sup>127</sup> On appeal, appellant challenged the trial court’s order finding that he was a common-law employee—rather than an independent contractor—of those public agencies, because that finding affecting his right to receive CalPERS retirement benefits.<sup>128</sup>

At the start of its discussion, the court noted appellant’s briefs contained “a total of 95 footnotes,” many of which raised new arguments not presented in the main text.<sup>129</sup> Citing *Sabi v. Sterling*<sup>130</sup> and *Requa*

*v. Regents of University of California*,<sup>131</sup> the court declined to consider any argument not set forth in the body of the appellate briefs, emphasizing that “footnotes are not the appropriate vehicle for stating contentions on appeal.”<sup>132</sup> The appellate court deemed those arguments forfeited and addressed only properly developed contentions,<sup>133</sup> and affirmed the order based on substantial evidence supporting the trial court’s finding.<sup>134</sup>

Likewise, in *Tindall v. County of Nevada*, the Third District applied forfeiture principles, declining to consider new theories not fully presented in trial court and raised for the first time on appeal.<sup>135</sup> Plaintiff sued the county for injuries sustained after slipping and falling on ice in a partially shaded, county-owned parking lot.<sup>136</sup> The trial court granted summary judgment for the county, finding it immune from liability under Government Code section 831, which shields public entities from liability for injuries caused by weather conditions on “streets” or “highways”—unless the resulting danger (here, the icy ground) would *not* be reasonably apparent to or anticipated by a person exercising due care.<sup>137</sup>

The Court of Appeal affirmed, holding that section 831’s “weather immunity” applied because the parking lot fell within the statute’s broad definition of a “street.”<sup>138</sup> The court also held plaintiff’s other theories were forfeited. First, plaintiff forfeit her claim that solar panels created a unique condition contributing to the ice accumulation because she raised it for the first time in opposition to summary judgment, and not in her pleadings.<sup>139</sup> Second, she forfeit her argument that a “reasonably careful person” would not have “anticipated the presence of ice in the parking lot” because she only raised it during oral argument in the trial court.<sup>140</sup>

Together, these decisions serve as a cautionary reminder that litigants should articulate arguments in the body of their appellate briefs and properly present them in the trial court to avoid forfeiture.

## APPEALABLE OR NOT?

In 2025, the Second District issued four opinions examining whether certain types of trial court orders—arising from unlawful detainer proceedings, domestic violence restraining orders, arbitration agreements, and attorney’s fees—are directly appealable.

### UNLAWFUL DETAINER

In *Eshagian v. Cepeda*, the appellate court held that a possession-only judgment in an unlawful detainer action is not appealable when the landlord’s damages claim remains unresolved.<sup>141</sup> The landlord filed an unlawful detainer action seeking possession, unpaid rent, holdover damages, and attorney fees.<sup>142</sup> The trial court entered a default judgment for possession only, reserving the issue of damages.<sup>143</sup> The tenant moved to vacate, arguing the three-day notice to pay rent or quit was defective; the trial court denied the motion.<sup>144</sup> The appellate court held the possession-only judgment was not appealable under Code of Civil Procedure section 904.2.<sup>145</sup> It explained that a judgment is only final when “no further judicial action” is required beyond compliance, and the unresolved damages rendered the judgment nonfinal.<sup>146</sup> The court also rejected the tenant’s argument the order was appealable under the collateral-order doctrine, reasoning the possession ruling was not “distinct and severable” from the lease dispute.<sup>147</sup>

Acknowledging the tenant’s concern that writ review is discretionary and rarely granted, the court emphasized that such discretion would be limited here.<sup>148</sup> Relying on California Supreme Court precedent, the court explained, under Code of Civil Procedure section 1086, writ review “has discretionary and mandatory components.”<sup>149</sup> If no “plain, speedy, and adequate remedy in the ordinary course of law” exists, then “a writ of mandate ‘must’ be issued,” but if “the petitioner has another [adequate] remedy by appeal,” then the reviewing court has discretion to deny the writ.<sup>150</sup> Here, the court concluded the lack of appealability and the unavailability of other trial court remedies made

writ review the tenant’s sole remedy to challenge the possession-only judgment.<sup>151</sup> It further held when a tenant files an “adequately pleaded” writ petition, “the appellate division *must* reach the merits,” and if the petition shows entitlement to relief, “must issue the writ . . . as a matter of right.”<sup>152</sup> As the first published decision resolving the issue of appealability in this context, the court treated the appeal as a writ petition and vacated the judgment based on procedural defects in the notice.<sup>153</sup>

### DOMESTIC VIOLENCE TRO

In *In re Marriage of A.M. & R.Y.*, the Court of Appeal held—for the first time—that an order denying a temporary restraining order under the Domestic Violence Prevention Act<sup>154</sup> is directly appealable.<sup>155</sup>

The DVPA “authorizes ex parte restraining orders (DVTROs) pending a hearing and long-term restraining orders (permanent DVROs) issued after a notice and hearing.”<sup>156</sup> Here, the wife sought a DVTRO alleging that the husband engaged in psychological, verbal, and emotional abuse, including coercive control and unwanted physical contact. The trial court denied the DVTRO, and the wife appealed.<sup>157</sup>

On appeal, the husband argued that a DVTRO is not appealable. The appellate court disagreed, holding, under Code of Civil Procedure section 904.1, subdivision (a)(6), an “order granting or refusing to grant an injunction is appealable,” and that restraining orders issued under the DVPA qualify as injunctions.<sup>158</sup> It explained the distinction between temporary (DVTRO) and long-term (DVRO) orders is immaterial for purposes of appealability because both “require a person to refrain from particular acts.”<sup>159</sup> It further analogized a DVTRO to a preliminary injunction, which existing precedent recognizes as directly appealable.<sup>160</sup> On the merits, the Court of Appeal reversed the denial of the DVTRO.<sup>161</sup>

## ARBITRATION

Next, the appellate court held, in *Arzate v. ACE American Insurance Co.*, a trial court order lifting a stay and finding a party's right to arbitration waived is directly appealable as the "functional equivalent" of an order denying a motion to compel arbitration.<sup>162</sup> Employees filed a wage-and-hour class action against their employer.<sup>163</sup> After granting the employer's motion to compel arbitration and staying the litigation, the trial court later lifted the stay and found the employer waived arbitration by failing to initiate arbitration within thirty days. The employer appealed this order, arguing that the employees were responsible for commencing arbitration.<sup>164</sup>

On appeal, the employees contended the order was not directly appealable under Code of Civil Procedure section 1294, subdivision (a), which allows appeals from orders "dismissing or denying" petitions to compel arbitration.<sup>165</sup> The Court of Appeal disagreed, reasoning that the order had the same effect as denying a motion to compel arbitration. Applying the "functional equivalent" doctrine—the rule that "an appeal may be taken from . . . an order not specified in a statute as appealable 'if in legal effect it is tantamount to one or more of the orders listed'"—the court held the order appealable.<sup>166</sup> It noted that no special exception exists for arbitration orders, and that declining to apply the doctrine would unfairly single out arbitration appeals, contrary to recent precedent holding that arbitration agreements should be treated like other contracts.<sup>167</sup> The court further observed the order was also appealable under the Federal Arbitration Act, which permits appeals from orders "refusing a stay" of litigation, as the agreement was governed by the FAA.<sup>168</sup>

## ATTORNEY FEES

In *Gumarang v. Braemer on Raymond, LLC*, the Court of Appeal allowed an appeal of an order denying the moving party's motion for attorney fees under the anti-SLAPP statute, Code of Civil Procedure section 425.16.<sup>169</sup> "Generally, an interlocutory order denying a motion for attorney fees entered

after an order denying or granting an anti-SLAPP motion is not appealable."<sup>170</sup> But where the merits of the anti-SLAPP motion are before the court, "it would be absurd to defer the issue of attorney fees until a future date, resulting in the probable waste of judicial resources."<sup>171</sup> "When the first issue is properly raised, appellate jurisdiction over both issues under section 425.16, subdivision (i) is proper."<sup>172</sup>

## TIMING ISSUES ON APPEAL

### TO TRIGGER 60-DAY NOTICE OF APPEAL DEADLINE FROM ELECTRONIC SERVICE, CLERK MUST INCLUDE SIGNED CERTIFICATE OF SERVICE IN SINGLE DOCUMENT WITH JUDGMENT

The First District clarified what qualifies as "showing the date" of service sufficient to trigger the 60-day notice of appeal deadline when the trial court clerk electronically serves a notice of entry of judgment or file-stamped copy of a judgment.<sup>173</sup> In *Wing Inflatables, Inc. v. Certain Underwriters at Lloyd's*, the trial court clerk e-mailed a file-stamped copy of a judgment to the parties, with the e-mail stating: "Please see the attached Order Denying Plaintiffs Motion for Attorney's Fees."<sup>174</sup> Plaintiff filed a notice of appeal approximately four months later and defendant argued it was untimely as it was filed after the 60-day deadline.<sup>175</sup> The Court of Appeal disagreed, reasoning that to trigger the 60-day deadline, the clerk must include a signed certificate of service attached to, stamped on, or imbedded into the judgment being served to "show[] the date" of service in a single document.<sup>176</sup> Consequently, the clerk's e-mail did not trigger the 60-day deadline because it lacked a signature necessary to make it a certificate of service, and regardless, even if signed, the clerk's message in the body of the e-mail was not attached to, stamped on, or imbedded into the judgment and thus did not comply with the "single document" rule.<sup>177</sup>

## NO RETROACTIVE JURISDICTION OVER APPEAL OF CLASS CERTIFICATION DENIAL FROM VOLUNTARY DISMISSAL OF PENDING REPRESENTATIVE CLAIMS

In *Chavez Reyes v. Hi-Grade Materials*, the Fourth District addressed whether an appellant can retroactively create appellate jurisdiction in an appeal of a class certification denial by voluntarily dismissing representative claims.<sup>178</sup>

The plaintiff appealed the denial of their class certification motion while the Private Attorney General Act of 2004 causes of action remained pending.<sup>179</sup> The defendants argued that the class certification denial was not an appealable order in light of the pending representative PAGA claims.<sup>180</sup> The plaintiff responded by voluntarily dismissing the PAGA claims in the trial court, over a year after the appeal initiated.<sup>181</sup>

This raised the question of first impression: does the voluntary dismissal of representative claims after a class certification denial retroactively confer appellate jurisdiction?<sup>182</sup> The Court of Appeal answered no.<sup>183</sup> The court reasoned: (1) the voluntary dismissal is not appealable; (2) no authority supports a “nonappealable event” (the voluntary dismissal) retroactively creating jurisdiction over a nonappealable order (the class certification denial); and (3) no exception to the one final judgment rule exists or should exist in these circumstances because it would “undermine [the rule’s] finality principle” and would encourage “protracted litigation,” “piecemeal appeals,” and tactics to circumvent appealability restrictions.<sup>184</sup> Declining to review the improper appeal as a writ petition, the opinion warns it is not the court’s “proper function to exercise appellate jurisdiction over an interlocutory order just to extricate a litigant from circumstances of his own creation.”<sup>185</sup>

## STATUTORY DEADLINE EXTENSIONS FOR SERVICE DO NOT EXTEND DEADLINES TRIGGERED BY REMITTITUR ISSUANCE

Transitioning from timing issues on the front end of an appeal to those on the back end, *Wash v. Banda-Wash* is the first published opinion to hold that statutory deadline extensions for service do

not apply to deadlines triggered by the issuance of a remittitur.<sup>186</sup> Here, the prevailing respondent filed a request for attorney fees on appeal 42 days after the remittitur was “entered in the record.”<sup>187</sup> The respondent argued the request was timely—despite the 40-day deadline “after issuance of the remittitur”<sup>188</sup>—because the remittitur was emailed to her attorney, and thus the two-day filing extension from electronic service should apply.<sup>189</sup>

The Fifth District disagreed.<sup>190</sup> Code of Civil Procedure section 1010.6, subdivision (a)(3)(B) extends deadlines based on electronic service when the deadline is triggered by “service of the document.”<sup>191</sup> But the deadline for an attorney fees request under California Rules of Court, rule 8.278(c)(1) is triggered by the “issuance of the remittitur.”<sup>192</sup> “Issuance” means “enter[ed] . . . in the record,” which is distinct from “service” of a document.<sup>193</sup> Remittiturs are entered into the record and sent to the parties, but are not served.<sup>194</sup> Therefore, deadline extensions for service do not impact deadlines triggered by the issuance of a remittitur, and the respondent’s attorney fees request in this case was untimely.<sup>195</sup>

## STAYS AND THE TRIAL COURT’S JURISDICTION PENDING APPEAL

### TRIAL COURT HAS JURISDICTION TO TAKE CONTRIBUTION MOTION OFF CALENDAR PENDING APPEAL

In *R&J Sheet Metal, Inc. v. W.E. O’Neil Construction Co. of California*, the Second District held that a stay pending appeal did not deprive the trial court of jurisdiction to take a contribution motion off calendar because doing so “has no impact on the judgment on appeal, but rather preserves the status quo, the very purpose of [Code of Civil Procedure] section 916.”<sup>196</sup>

Pending the appeal of a judgment holding defendants joint and severally liable, one defendant filed a motion for contribution from the other defendant after paying off the judgment in full.<sup>197</sup> In response, the trial court took the motion off calendar, reasoning the stay pending appeal pauses

enforcement of the judgment.<sup>198</sup> The appellant-defendant argued due to the stay, the trial court could only strike or dismiss the motion, not take it off calendar.<sup>199</sup> The Court of Appeal affirmed the trial court's jurisdiction to place the motion off calendar despite the stay because it "[did] not jeopardize the status quo or risk affecting the outcome of the appeal."<sup>200</sup> Moreover, because a stay only temporarily deprives a court of subject matter jurisdiction, placing the motion off calendar, rather than dismissing it and requiring a party to re-file, "makes sense as a matter of judicial economy."<sup>201</sup>

### **TRIAL COURT HAS JURISDICTION TO DECIDE MOTION FOR RELEASE PENDING APPEAL**

In a similar vein, the Sixth District contemplated a trial court's authority to decide a criminal defendant's motion for release pending appeal of his conviction in *Stubblefield v. Superior Court*.<sup>202</sup> After the Court of Appeal vacated the defendant's conviction and sentence, but pending the issuance of the remittitur, the defendant filed a motion for release in the trial court.<sup>203</sup> The trial court refused to decide the motion on the grounds that it lacked jurisdiction pending the remittitur, so the defendant filed a writ petition, and the attorney general, on behalf of the People, filed a response conceding the trial court had jurisdiction to decide the motion.<sup>204</sup> The appellate court agreed and granted the writ.<sup>205</sup> While the stay pending appeal strips the trial court of jurisdiction "over the *subject matter* of the order or judgment on appeal" until the remittitur issues, the trial court does not lose jurisdiction "over the parties," "incidental aspects of the cause," or actions carved out by statute.<sup>206</sup> Penal Code sections 1272, 1272.1, and 1291 provide courts with power (subject to certain exceptions) to decide a motion for release despite a pending appeal.<sup>207</sup> These statutes rest on the reasoning that a motion for release is not a "matter embraced in the [appeal] and not affected by the judgment or order" and is thus not an action automatically stayed pursuant to Code of Civil Procedure section 916.<sup>208</sup> As a result, based on "[t]he plain language of the statutory scheme" and lack of contrary case law, the trial court had

jurisdiction to decide the defendant's motion for release pending appeal.<sup>209</sup>

### **VEXATIOUS LITIGANT PRE-FILING ORDER IS A PROHIBITORY INJUNCTION NOT AUTOMATICALLY STAYED PENDING APPEAL**

The Sixth District weighed in again on the issue of stays pending appeal, this time in the context of vexatious litigants. In *Steshenko v. Board of Trustees of Foothill-De Anza Community College District*, the court held a pending appeal does not automatically stay a vexatious litigant pre-filing order because the pre-filing order is a prohibitory injunction.<sup>210</sup> One exception to the general rule of automatic stays under section 916 is for injunctions: while mandatory injunctions (which "require[] affirmative action") are automatically stayed, prohibitory injunctions (which "restrain" conduct or "halt a particular condition") are not.<sup>211</sup> Because a pre-filing order "require[s] [the vexatious litigant] to refrain from doing a particular act—filing any new litigation without certain permission"—it is a prohibitory injunction and is not automatically stayed pending appeal.<sup>212</sup>

### **SUCCESSFUL RESPONDENT ENTITLED TO APPELLATE ATTORNEYS' FEES IN DISCOVERY SANCTIONS APPEAL**

In *Baer v. Tedder*, the Court of Appeal authorized a respondent to recover appellate attorney fees for successfully defending an appeal of a discovery sanctions order.<sup>213</sup> The plaintiff in *Baer* filed a motion for appellate fees after successfully defending an appeal of a \$10,475 discovery sanctions order issued against the defendant and his attorney. The trial court issued \$113,532.50 in appellate fees against the unsuccessful defendant only, and not against his co-appellant attorney.<sup>214</sup>

The Court of Appeal held that the statutes authorizing fee shifting as a sanction for discovery abuse, Code of Civil Procedure sections 2023.030 and 2031.320, also permit the recovery of appellate fees to a successful respondent.<sup>215</sup> Further, it agreed with the plaintiff that the trial court should have awarded appellate fees against both the

unsuccessful defendant and his attorney jointly and severally.<sup>216</sup> The attorney had voluntarily appealed the underlying sanctions order independently of his client. He therefore forced the plaintiff to incur appellate fees and costs in the same manner as his client and should bear joint responsibility for any ensuing fees.<sup>217</sup>

## WRIT DEVELOPMENTS

### TO OBTAIN APPELLATE REVIEW OF AN ORDER DENYING A MOTION TO STRIKE A SLAPBACK SUIT, A PARTY MUST FILE A WRIT PETITION RATHER THAN AN INTERLOCUTORY APPEAL

In *Wong v. Dong*,<sup>218</sup> two landlords sued their tenant over unpaid rent. The tenant filed a cross-complaint asserting abuse of process and other claims against the landlords. The landlords filed a motion to strike the cross-complaint under Code of Civil Procedure section 425.16, the “anti-SLAPP” statute. While the anti-SLAPP motion was pending, the tenant voluntarily dismissed the cross-complaint. Despite the dismissal, the trial court ruled on the merits of the anti-SLAPP motion for purposes of determining the landlords’ entitlement to attorney fees.<sup>219</sup> The court concluded the anti-SLAPP motion would have been granted if the cross-complaint had not been dismissed.<sup>220</sup> The landlords subsequently filed a malicious prosecution action against the tenant for damages caused by the tenant’s cross-complaint. The tenant responded by filing his own anti-SLAPP motion to strike the malicious prosecution suit, which the trial court denied. The tenant then filed an interlocutory appeal from the trial court’s order denying that motion.<sup>221</sup>

Acting on its own initiative, the Court of Appeal dismissed for lack of jurisdiction the tenant’s appeal from the denial of his anti-SLAPP motion.<sup>222</sup> The court explained that while an order granting or denying an anti-SLAPP motion is immediately appealable as an exception to the “one final judgment” rule, this exception does not apply if a party moves to strike a “SLAPPback,” which is a claim for malicious prosecution or abuse of process arising from the filing or maintenance of

a prior cause of action that has been dismissed by an anti-SLAPP motion.<sup>223</sup> The court observed that the Legislature, in enacting the SLAPPback statute (Code of Civil Procedure section 425.18), sought to favor SLAPPback plaintiffs and to limit abuse of the judicial process by SLAPP filers.<sup>224</sup> The Legislature foreclosed an interlocutory appeal from a trial court’s order denying a motion to strike a SLAPPback action, and instead authorized appellate review only through a peremptory writ petition filed within 20 days after notice of entry of the order is served.<sup>225</sup>

Applying these principles, the Court of Appeal concluded the landlords’ malicious prosecution action qualified as a SLAPPback suit because it was an action for malicious prosecution that arose from the tenant’s cross-complaint, which was the subject of an anti-SLAPP motion, even though the tenant dismissed the cross-complaint after the landlords filed that anti-SLAPP motion.<sup>226</sup> Accordingly, if the tenant wished to seek appellate review of the denial of his motion to strike the SLAPPback claim, he was required to file a timely writ petition. Because he did not do so, the Court of Appeal dismissed for lack of jurisdiction the appeal from the denial of the tenant’s anti-SLAPP motion.<sup>227</sup>

### A PARTY MAY SEEK POSTJUDGMENT REVIEW OF A GOOD-FAITH SETTLEMENT DETERMINATION

In *Fennessy v. Altoonian*,<sup>228</sup> plaintiffs purchased a home, but after the sale closed, they discovered allegedly-concealed details of a death that had previously occurred on the property. Plaintiffs sued the seller and his agents seeking rescission and other relief, and the seller filed a cross-complaint against his agents for indemnity and contribution, among other claims. After plaintiffs settled their claims against the agents, the agents successfully moved for a determination that the settlement was entered in good faith under Code of Civil Procedure sections 877 and 877.6. Granting the good-faith settlement determination, the trial court found that all of the seller’s cross-claims against the agents were barred under section 877.6, subdivision (c). Plaintiffs

proceeded to trial on their claims against the seller, and a jury found the seller not liable.<sup>229</sup>

The seller appealed, arguing that the trial court erred in finding that the good-faith settlement determination barred three of his cross-claims against the agents. The agents responded that the appeal should be dismissed on the ground that a good-faith settlement determination can be reviewed only through a petition for writ of mandate under section 877.6, subdivision (c).<sup>230</sup> The Court of Appeal observed the intermediate appellate courts are split on the question whether a writ petition is the exclusive means of challenging an order approving or denying a good-faith settlement determination, and the California Supreme Court had previously granted review to resolve this question but later dismissed the case.<sup>231</sup> The Court of Appeal also acknowledged there is some force to the policy arguments asserted by the agents and other courts that allowing postjudgment review of a good-faith settlement determination “would prevent the very finality and certainty that writ review was intended to promote.”<sup>232</sup> But the Court of Appeal ultimately concluded the statutory text and legislative history establish that a good-faith settlement determination may be challenged not only by writ petition but also by a postjudgment appeal.<sup>233</sup>

## JUDICIAL COUNCIL RULES CHANGES

There was one notable change to the California Rules of Court this year affecting appellate practitioners. The Judicial Council adopted significantly amended rule 8.885(b), pertaining to remote oral arguments in the appellate division of superior courts in limited civil and misdemeanor appeals. Effective January 1, 2026, the new rule provides that “[o]ral argument may be conducted in whole or in part through the use of remote technology,” so long as the presiding judge of the relevant appellate division authorizes it and the parties agree.<sup>234</sup> An earlier version of the rule, adopted in 2010 when videoconferencing technology was less advanced, authorized a more limited form of remote argument, but still often

required significant travel on the part of judges and attorneys. This was particularly burdensome in more rural parts of the state. After a successful pilot program involving superior courts in Lassen, Modoc, Plumas, and Sierra counties, the judicial council adopted the new rule statewide. The rule includes safeguards designed to protect the public’s ability to view remote arguments,<sup>235</sup> and specifies that “[p]arties with a fee waiver may not be charged fees for remote appearances.”<sup>236</sup>

## ENDNOTES

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In the broader legal community, Shuray co-chairs the California Appellate Courts Committee's Access to Justice Subcommittee and was honored with a CLAY (California Lawyer of the Year) Award in 2018 for her work in *Priscila N. v. Leonardo G.* (2017) 17 Cal. App.5th 1208.

Before joining FVAP, she practiced trial and appellate law at Stoel Rives LLP and Wolfe Wyman LLP in environmental, construction, financial services, business, and real estate matters, and handled numerous pro bono cases. She later managed the legal services department at a domestic violence shelter in the Bay Area.

Prior to her legal career, she worked with lobbyists and United States senators in Washington, D.C., on global policy issues affecting women—a lifelong passion shaped in part by her experience as the daughter of immigrants who fled Iran during the 1979 revolution.

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Ari's current representations include business and family law appeals, and serving as "embedded appellate counsel" during a jury trial.

Outside of his practice, Ari serves as a Lecturer in Law at USC Gould School of Law, where he teaches a class called U.S. Common Law Analysis & Skills. He sits on

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Kelly clerked for the Honorable Robert Browning, U.S. Court of Appeals for the Ninth Circuit, and the Honorable David Ezra, U.S. District Court for the District of Hawaii. She is a past Chair of the Committee on Appellate Courts of the CLA Litigation Section, serves on the Executive Committee of the CLA Litigation Section and the Bar Association of San Francisco's Appellate Law Section, is President of the U.C. Law San Francisco Alumni Board of Governors, and is a founder and Vice President of the Bay Area Appellate Inn of Court.

1. (TRO). See, e.g., *Abbott v. Perez* (2018) 585 U.S. 579, 595.
2. (2025) 604 U.S. 650.
3. *Id.* at pp. 650–651.
4. *Ibid.*
5. *Ibid.*
6. See 28 U.S.C. § 2107(c).
7. (2025) 605 U.S. 376.
8. *Id.* at p. 379.
9. *Ibid.*
10. *Id.* at p. 391.
11. (2025) 604 U.S. 305.
12. *Ibid.*
13. *Id.* at p. 315.
14. *Ibid.*
15. *Ibid.*

16. (9th Cir. 2025) 135 F.4th 784 (*Simon*).
17. (9th Cir. 2025) 147 F.4th 1103 (*Las Vegas Sun*).
18. *Simon, supra*, 135 F.4th at p. 814.
19. *Id.* at pp. 814–815.
20. *Las Vegas Sun, supra*, 147 F.4th at p. 1112.
21. *Ibid.*
22. (9th Cir. 2025) 154 F.4th 696, 699 (*Gopher Media*) (citing *Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018).
23. *Id.* at p. 701.
24. *Id.* at p. 702, fn. 3.
25. *Ibid.*; see *id.* at p. 704 (conc. opn. of Bennett, J.); *id.* at pp. 710–711 (conc. opn. of Bress, J.).
26. Code Civ. Proc., § 425.16, subd. (i).
27. *Gopher Media, supra*, 154 F.4th at p. 711 (conc. opn. of Bress, J.).
28. *Id.* at pp. 712, 714.
29. (9th Cir. 2025) 145 F.4th 972 (*Immigrant Defenders*).
30. *Id.* at p. 980.
31. (1981) 450 U.S. 79.
32. *Immigrant Defenders, supra*, 450 U.S. at pp. 983–984.
33. *Id.* at pp. 984–985.
34. *Id.* at pp. 985.
35. (9th Cir. 2025) 127 F.4th 1.
36. *Id.* at pp. 26–27.
37. *Ibid.*
38. *Id.* at p. 31.
39. *Id.* at pp. 28–31.
40. (9th Cir. 2025) 133 F.4th 852 (en banc) (*Duncan*).
41. (9th Cir. 2021) 19 F.4th 1087 (en banc).
42. *Id.* at p. 1096.
43. (2022) 597 U.S. 1.
44. *Duncan, supra*, 133 F.4th at p. 864.
45. *Ibid.*
46. *Id.* at pp. 890–891 (dis. opn. of Nelson, J.).
47. *Id.* at p. 891.
48. (9th Cir. 2025) 127 F.4th 1180.
49. *Id.* at p. 1182.
50. (9th Cir. 2025) 140 F.4th 1079.
51. *Id.* at p. 1088.
52. *Id.* at p. 1089.
53. (9th Cir. 2025) 150 F.4th 1205.

54. *Id.* at p. 1207.
55. *Id.* at pp. 1210–1211.
56. *Id.* at p. 1208.
57. *Ibid.*
58. *Ibid.*
59. (9th Cir. 2025) 154 F.4th 1145.
60. *Id.* at p. 1148 (citing *Colorado River Conservation Dist. v. United States* (1976) 424 U.S. 800).
61. *Id.* at p. 1152.
62. *Ibid.*
63. (2025) 109 Cal.App.5th 621, 625 (*Maniago*).
64. *Id.* at pp. 625–627.
65. (2001) 87 Cal.App.4th 1006.
66. *Maniago, supra*, 109 Cal.App.5th at pp. 629–630.
67. *Id.* at p. 630.
68. *Ibid.*
69. *Ibid.*
70. (2024) 17 Cal.5th 228.
71. *Id.* at pp. 235, 239–240.
72. *Id.* at p. 240.
73. *Id.* at pp. 240–241.
74. *Ibid.*
75. *Id.* at pp. 251–252.
76. *Ibid.*
77. *Id.* at p. 252.
78. *Id.* at pp. 252–254.
79. (2025) 18 Cal.5th 293 (*Center for Biological Diversity*).
80. *Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406, 410–411.
81. *Id.* at 307.
82. *Id.* at 303, 308.
83. *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.
84. *Center for Biological Diversity, supra*, 18 Cal.5th at p. 305.
85. As approved by voters, Gen. Elec. (Nov. 8, 2016), § 1.
86. Stats. 2020, ch. 317.
87. Gov. Code, § 68662; Pen. Code, § 1509.
88. See Pen. Code, § 745.
89. See Cal. Supreme Ct., Policies Regarding Cases Arising from Judgments of Death, available at <<https://tinyurl.com/5n7dnu5e>>; Cal. Supreme Ct., Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants in the California Supreme Court, available at <<https://tinyurl.com/yc2eajrd>>.
90. *Ibid.*
91. See *ibid.*
92. *Ibid.*
93. *Ibid.*
94. See Cal. Supreme Ct, Rules Regarding Electronic Filing, as amended January 1, 2020.
95. *Id.*, as amended March 18, 2020.
96. *Ibid.*
97. *Id.*, as amended August 13, 2025, available at <<https://tinyurl.com/53nf72s2>>.
98. *Ibid.*
99. (2025) 114 Cal.App.5th 426, 431.
100. *Id.* at pp. 430–431, 436.
101. *Id.* at p. 435.
102. *Id.* at pp. 431, 443.
103. *Id.* at p. 445.
104. *Id.* at pp. 445–446.
105. *Id.* at p. 446 (quoting <<https://tinyurl.com/4p59uyup>> (as of Sept. 12, 2025), archived at <<https://perma.cc/KG9Q-7YQD>>).
106. *Id.* at p. 448.
107. *Ibid.*
108. *Id.* at pp. 436, 449.
109. (2025) 109 Cal.App.5th 486, 525.
110. *Id.* at pp. 492–493.
111. *Id.* at p. 525.
112. *Ibid.* (quoting *Martinez v. O'Hara* (2019) 32 Cal.App.5th 583, 857).
113. *Id.* at p. 526 (quoting *In re Mahoney* (2021) 65 Cal. App.5th 376, 381).
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116. (2025) 114 Cal.App.5th 43, 53–55.
117. *Id.* at p. 50.
118. *Ibid.*
119. *Id.* at p. 54.
120. *Ibid.*
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122. (2025) 115 Cal.App.5th 293, 296.

123. *Id.* at p. 299.
124. *Id.* at p. 300.
125. (2025) 108 Cal.App.5th 1048, 1062.
126. (CalPERS).
127. *Id.* at pp. 1055–1061.
128. *Id.* at p. 1062.
129. *Ibid.*
130. (2010) 183 Cal.App.4th 916.
131. (2012) 213 Cal.App.4th 213.
132. *Ibid.*
133. *Ibid.*
134. *Id.* at pp. 1069–1079.
135. (2025) 112 Cal.App.5th 78, 81.
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137. *Id.* at pp. 82–83.
138. *Id.* at pp. 85–89.
139. *Id.* at p. 90.
140. *Id.* at pp. 90–91.
141. (2025) 112 Cal.App.5th 433, 447–448.
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143. *Id.* at p. 444.
144. *Ibid.*
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149. *Ibid.*
150. *Ibid.*
151. *Id.* at pp. 452–454.
152. *Id.* at p. 454.
153. *Id.* at p. 456.
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156. *Id.* at p. 1125 (citations omitted).
157. *Id.* at pp. 1122–1123.
158. *Ibid.*
159. *Ibid.*
160. *Ibid.*
161. *Id.* at pp. 1124, 1130.
162. (2025) 108 Cal.App.5th 1191, 1197–1198.
163. *Id.* at p. 1194.
164. *Id.* at pp. 1195–1196.
165. *Id.* at p. 1197.
166. *Id.* at pp. 1197–1198.
167. *Ibid.* (citing *Quach v. Cal. Commerce Club, Inc.* (2024) 16 Cal.5th 562, 580).
168. *Id.* at p. 1198 (citing 9 U.S.C. § 1 et seq. (FAA)).
169. (2025) 110 Cal.App.5th 370, 387.
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172. *Id.* at pp. 387–388 (internal quotation marks and citations omitted).
173. *Wing Inflatables, Inc. v. Certain Underwriters at Lloyd's* (2025) 112 Cal.App.5th 1108, 1111 (citing Cal. Rules of Court, rule 8.104(a)(1)(A)).
174. *Id.* at p. 1112.
175. *Ibid.*
176. *Id.* at pp. 1112–1117.
177. *Id.* at pp. 1115–1117 (citing *Alan v. American Honda Motor Co.* (2007) 40 Cal.4th 894, 904–905).
178. (2025) 110 Cal.App.5th 1089, 1093–1094 (*Chavez Reyes*).
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182. *Id.* at pp. 1093, 1099.
183. *Ibid.*
184. *Id.* at pp. 1099–1102.
185. *Id.* at pp. 1103–1104.
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191. *Id.* at p. 570.
192. *Ibid.*
193. *Id.* at pp. 570–573.
194. *Id.* at pp. 566, 570–571.
195. *Id.* at p. 573.
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209. *Id.* at pp. 681–682.
210. *Steshenko v. Bd. of Trustees of Foothill-De Anza Community College Dist.* (2025) 112 Cal.App.5th 1300, 1312–1313.
211. *Id.* at p. 1312 (quoting *Hayworth v. City of Oakland* (1982) 129 Cal.App.3d 723, 728 and *People v. Mobile Magic Sales, Inc.* (1979) 96 Cal.App.3d 1, 13).
212. *Id.* at pp. 1312–1313 (quoting *Lockett v. Panos* (2008) 161 Cal.App.4th 77, 85); see Code Civ. Proc., § 391.7, subd. (a).
213. *Baer v. Tedder* (2025) 115 Cal.App.5th 1139.
214. *Id.* at p. 1146.
215. *Id.* at pp. 1149–1154.
216. *Id.* at pp. 1164–1166.
217. *Id.* at p. 1166.
218. (2025) 112 Cal.App.5th 109, 113.
219. *Ibid.*
220. *Id.* at pp. 113–114.
221. *Id.* at pp. 114–115.
222. *Id.* at p. 114.
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224. *Id.* at p. 116.
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226. *Id.* at p. 116.
227. *Id.* at p. 117.
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230. *Ibid.*
231. *Id.* at pp. 621–622.
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233. *Id.* at pp. 622–625.
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235. *Id.* at rule 8.885(b)(3)(C).
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# ART LAW

2025 was a big year for art law. We saw new twists (and a new statute) in California’s long-running Nazi stolen art case, two significant copyright decisions from the Ninth Circuit on substantial similarity, and a case enforcing the Unruh Civil Rights Act<sup>4</sup> against a baker refusing to provide a wedding cake for a same-sex wedding despite First Amendment claims.

## ANOTHER YEAR OF THE *CASSIRER* CHOICE OF LAW SAGA

It seems it would not be a year in art law without further developments in the *Cassirer v. Thyssen-Bornemisza Collection* litigation. Heirs of the pre-World War II owners of a Camille Pissarro painting filed litigation to recover it in the Central District of California in 2005. Since then, the case has been up and down the federal courts, with multiple stops at the U.S. Supreme Court. The painting, taken by the Nazis in the late 1930s, remains on display at the government-owned Thyssen-Bornemisza museum in Madrid, Spain.

In 2022, the U.S. Supreme Court reversed the Ninth Circuit and held that California’s choice-of-law rules should govern the case, not Spain’s.<sup>5</sup> On remand, the Ninth Circuit held, in January 2024, that under California’s choice of law rule, Spanish substantive law should govern.<sup>6</sup> The appeals court therefore affirmed the district court’s prior ruling that, under Spanish law, the museum held title to the painting so the claimants therefore could not recover it.<sup>7</sup>

Two developments late in 2024 left us certain we would have more to report this year. First, California enacted Assembly Bill 2867, which requires that, notwithstanding California’s longstanding choice-of-law rules, California substantive law must be applied in any case brought by a California resident seeking “to recover fine art or an item of historical, interpretive, scientific, or artistic significance.”<sup>8</sup> The law applies to any pending or future case<sup>9</sup>—seemingly tailor made to govern the *Cassirer* litigation. And then in December 2024, the *Cassirer* claimants filed a cert petition in the Supreme Court.<sup>10</sup>

In March 2025, the Supreme Court summarily vacated the Ninth Circuit’s decision in favor of the museum and remanded “for further consideration in light of Assem. Bill 2867”<sup>11</sup>—the new California statute. On April 30, 2025, the Ninth Circuit remanded the case to the district court for further proceedings.<sup>12</sup>

And it remains there as of this writing. On November 17, 2025, California Attorney General Rob Bonta filed a motion to intervene in the case, in order to defend Assembly Bill 2867 against claims by Spain that the statute is unconstitutional as seeking to “reopen time-barred claims and transfer property whose ownership is already vested” and as an incursion on the federal government’s exclusive purview over foreign affairs.<sup>13</sup> On December 5, 2025 the parties filed a joint stipulation that would permit Bonta to join as an intervenor “for the limited purpose of defending duly enacted California laws.”<sup>14</sup> On December 9, 2025, the district court granted the intervention motion as unopposed.<sup>15</sup> Meanwhile, Congress is considering enacting an extended and amended version of the Holocaust Expropriated Art Recovery Act of 2016,<sup>16</sup> which is otherwise set to sunset at the end of 2026. The existing statute extended the statute of limitations for any case in state or federal court seeking to recover Nazi-looted art.<sup>17</sup> The proposed bill would explicitly bar the assertion of laches or acquisitive prescription—the doctrine that defeated the claim in *Cassirer*—in such cases; indeed, the text of the bill makes clear it is intended to reverse the holding of the Ninth Circuit’s 2024 *Cassirer* decision.<sup>18</sup> And the proposed bill states that it would apply to any case that is not final, including any case pending on appeal, as of the date of enactment.<sup>19</sup> So if the new California statute does not prolong proceedings in *Cassirer*—and perhaps change the outcome—then perhaps the new HEAR Act, if enacted, will do so.

As we’ve said the last couple of years about *Cassirer*, stay tuned!

## THE NINTH CIRCUIT GIVETH ON SUBSTANTIAL SIMILARITY GROUNDS

The Ninth Circuit issued a major ruling for a plaintiff on access and substantial similarity grounds in *Ambrosetti v. Oregon Catholic Press*.<sup>20</sup> The case began when Vincent Ambrosetti, a musician and songwriter, alleged that the defendants, composer Bernadette Farrell and publisher Oregon Catholic Press, impermissibly copied a song he wrote in 1980 named “Emmanuel” and incorporated it into a new

song written by Farrell in 1993 called “Christ Be Our Light.”<sup>21</sup> Ambrosetti alleged that he had released commercial versions of “Emmanuel” with several high-profile orchestras and publicly performed “Emmanuel” at hundreds of events in the 1980s and early 1990s.<sup>22</sup> Ambrosetti further alleged that he met Oregon Catholic Press’s publisher (who later married Farrell) at a convention where he performed “Emmanuel” and later sent the publisher several copies of his song in 1986 and 1987.<sup>23</sup>

After the parties completed discovery, the district court entered summary judgment against Ambrosetti for failing to show that there was a “reasonable possibility that Farrell could have accessed” Ambrosetti’s song before she wrote “Christ Be Our Light” or that the two works were strikingly similar.<sup>24</sup> While Ambrosetti had attempted to introduce letters between him and Oregon Catholic Press’s publisher to show that he had sent a copy of “Emmanuel” to Oregon Catholic Press and thus that Farrell may have had access to it, the district court declined to admit that evidence as a sanction for failing to timely disclose this theory during discovery.<sup>25</sup> Without this evidence, the district court held Ambrosetti could not meet his burden of showing a reasonable possibility that Farrell had access to and in fact copied his song.<sup>26</sup> While the court agreed that Ambrosetti had shown that a jury could find that the works were “substantially similar,” it held that they were not strikingly similar.<sup>27</sup> The district court consequently entered summary judgment against Ambrosetti because he would be unable to show either access or striking similarity.<sup>28</sup>

On appeal, the Ninth Circuit affirmed the district court’s decision to exclude the letters between Ambrosetti and Oregon Catholic Press’s publisher but reversed on the district court’s substantial similarity ruling.<sup>29</sup> It concluded that, even without evidence of the letters, Ambrosetti had created a genuine dispute of material fact with respect to two theories: (1) a “chain of events” theory, under which Ambrosetti could use circumstantial evidence to prove access by “establishing a chain of events linking the plaintiff’s work and the defendant’s

access”; and (2) a “widespread dissemination” theory, under which Ambrosetti could establish that his work had been “broadly distributed” and so may have been accessible to the defendants.<sup>30</sup> Regarding the former, Ambrosetti presented evidence that Farrell and Oregon Catholic Press’s publisher attended two relatively small conferences at which Farrell played “Emmanuel.”<sup>31</sup> Regarding the latter, the Ninth Circuit found that Ambrosetti had adequately shown that a reasonable possibility of access based on the dissemination of his work because he, Farrell, and Oregon Catholic Press “were all members of the same part of the same liturgical community during the relevant period, as demonstrated by their attendance at the same niche conventions,” and Ambrosetti did not “need to show widespread dissemination among musicians generally, but only among members of this small scene.”<sup>32</sup>

The Ninth Circuit further found that Ambrosetti had adequately shown a genuine dispute of material fact on the issue of substantial similarity.<sup>33</sup> Ambrosetti had presented expert evidence showing 23 “aggregate similarities” between “Emmanuel” and “Christ Be Our Light,” which Farrell and Oregon Catholic Press declined to rebut with their own expert analysis.<sup>34</sup> Farrell and Oregon Catholic Press instead argued that expert evidence was unnecessary because substantial similarity should be evaluated by looking at the individual elements present in each song—e.g., pitch, rhythm, and metrical placement—without reference to other elements or characteristics.<sup>35</sup> The Ninth Circuit disagreed, noting that “[w]e cannot separate out each piece of glass within the kaleidoscope of an overall work: rather, we must view the work as the sum of all the relevant elements together.”<sup>36</sup> The court then found that, when looking at the aggregate characteristics of each song, Ambrosetti had presented enough evidence to show that “Emmanuel” and “Christ Be Our Light” were substantially similar.<sup>37</sup> It found persuasive the fact that Farrell and Oregon Catholic Press were unable to point to any other song that “shares all or most of the relevant similarities outside of pitch sequence.”<sup>38</sup> The court also concluded this was sufficient to

satisfy the striking similarity standard, which independently warranted reversing the district court’s opinion.<sup>39</sup>

*Ambrosetti* provides key guidance for addressing access and substantial and striking similarity issues through discovery, and California copyright and art law litigators should keep it top-of-mind going into the new year.

## THE NINTH CIRCUIT TAKETH AWAY ON SUBSTANTIAL SIMILARITY GROUNDS

Going the other way, the Ninth Circuit issued a second significant copyright decision in *Biani v. Showtime Networks, Inc.*,<sup>40</sup> this time holding that the plaintiff failed to establish that two works were substantially or strikingly similar. In *Biani*, plaintiff Anna Biani sued Showtime, alleging that its show *Penny Dreadful* infringed on several characters Biani created and published on an online-role playing forum.<sup>41</sup> Biani asserted that, on the forum, she created three original characters: Charlotte Émilie Benoit, Frederick FitzClarence, and Landon Otis Lloyd.<sup>42</sup> Charlotte was a “slim, thirty-one-year-old ‘witch doctor’ and ‘[a]ssassin,’ with ‘magical healing abilities,’” whom Biani noted would be best portrayed by actress Eva Green; Frederick was an “imposter” who “suffer[ed] from ‘seizures’ and ‘dark thoughts’” who had been abandoned by his family; Landon was a “clairvoyant ‘explorer,’ who dreams about future events and ‘lives a nomadic lifestyle, constantly traveling from one country to another,’” and who moved to London to become “a private investigator who solves mysteries using his ‘powers of clairvoyance.’”<sup>43</sup>

Biani alleged that two characters on *Penny Dreadful* improperly copied aspects of the characters she created.<sup>44</sup> One of the characters, Vanessa, was played by Eva Green, was a “witch with supernatural abilities, which manifest as seizures and visions.”<sup>45</sup> The second character, Malcolm, was “portrayed as a British explorer” who teamed up with Vanessa to find Malcolm’s missing daughter and, in the process, confronted various supernatural creatures like Count Dracula.<sup>46</sup> Biani did not allege any specific

facts indicating that Showtime had accessed or copied her characters, but she asserted that Vanessa and Malcolm were so strikingly similar as to warrant an inference of copying.<sup>47</sup>

The district court disagreed and dismissed Biani's claims for failing to allege that Vanessa and Malcolm were substantially or strikingly similar to Biani's characters Charlotte, Frederick, or Landon.<sup>48</sup> The Ninth Circuit affirmed.<sup>49</sup> It held that, while there were some similarities between the characters, there were "many more differences than similarities" between the characters.<sup>50</sup> For example, Charlotte was described as "never feel[ing] remorse after her homicides," but in *Penny Dreadful*, Vanessa never killed anyone and indeed expressed grief after Malcolm ultimately killed his daughter to save Vanessa.<sup>51</sup> While casting Eva "appear[ed] striking," the court declined to rule out that both Biani and Showtime "independently identified" her as the right fit for the role.<sup>52</sup>

The Ninth Circuit further held that the characteristics and descriptions that Biani created for her characters were "at a level of generality that is unprotectable."<sup>53</sup> It explained that many of these characteristics—that Charlotte was "similarly-aged," "strong," "beautiful," "dress[ed] in Victorian attire," and "engage[d] in witchcraft and 'deviant behavior'"—were unprotectable as being more similar to "basic plot ideas" rather than specific elements that can be copyrightable.<sup>54</sup>

## BAKER CANNOT ESCAPE UNRUH CIVIL RIGHTS ACT VIOLATION WITH FIRST AMENDMENT DEFENSE

In a case following a similar fact pattern as *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,<sup>55</sup> where in 2018 the United States Supreme Court ruled in favor of a baker who refused to bake a cake for a same-sex marriage, a California appellate court ruled that a similar refusal by a baker to sell a cake for a same-sex marriage violated the Unruh Civil Rights Act.<sup>56</sup>

A same-sex couple attempted to buy a cake for their wedding from Tastries bakery after choosing a simple, plain white design from Tastries's preexisting, inedible sample cake displays.<sup>57</sup> However, upon learning it was a same-sex wedding, Tastries bakery refused to provide the couple with the cake, citing the bakery's design standards which stated that Tastries will not accept requests that "violate fundamental Christian principals [sic]; wedding cakes must not contradict God's sacrament of marriage between a man and a woman."<sup>58</sup> Owner Catharine Miller explained that she developed these design standards in consultation with her minister and based on her sincerely held religious beliefs that marriage is limited to one man and one woman.<sup>59</sup> When Miller informed the couple she would not sell them a wedding cake, she also referred them to another bakery, Gimme Some Sugar.<sup>60</sup> The California Civil Rights Department subsequently filed suit against Miller and her company, Cathy's Creations, seeking injunctive relief and monetary damages for violations of the UCRA.<sup>61</sup>

The trial court held that defendants did not violate the UCRA because the bakery's design standards were facially neutral and therefore had no discriminatory intent.<sup>62</sup> Further, the trial court held that Miller's referral to Gimme Some Sugar constituted full and equal access under the UCRA.<sup>63</sup> Finally, after considering defendants' First Amendment defenses, the trial court held that under California Supreme Court precedent the UCRA is a valid and neutral law of general applicability that survives strict scrutiny.<sup>64</sup>

The Fifth District Court of Appeal reversed the trial court's decision.<sup>65</sup> First, the Fifth District held that the design standard regarding wedding cakes was not facially neutral because it "specifically applies and operates around the sexual orientation of the couple to be married."<sup>66</sup> While defendants argued that Tastries will deny a cake contradicting that marriage is between a man and a woman to any customer regardless of their protected status,<sup>67</sup> the Fifth District explained that the policy cannot be applied unless or until defendants have ascertained the same-sex status of the couple. Therefore, a

substantial motivating reason for refusing service under the policy is necessarily the sexual orientation of the couple and it is not facially neutral.<sup>68</sup>

Second, the Fifth District held that the trial court incorrectly applied previous precedent in concluding that Miller’s referral to Gimme Some Sugar provided the couple with full and equal access under the UCRA.<sup>69</sup> The Fifth District noted: “Discriminatorily denying service and then telling would-be customers they may take their business down the street (or farther) to a separate, unassociated establishment where they may be served by way of referral in no way ensures full and equal access to the product or service at the same price and under the same conditions.”<sup>70</sup> In fact, allowing for such a referral model would “endorse” discriminatory practices that would be “antithetical” to the UCRA’s purpose.<sup>71</sup>

Finding defendants violated the UCRA, the Fifth District next turned to defendants’ First Amendment defenses. The trial court concluded that preparation and sale of wedding cakes constitute both “pure speech” and expressive conduct protected by the First Amendment, and that requiring defendants to provide a wedding cake to same-sex couples under the UCRA would compel speech defendants disagree with in violation of the First Amendment.<sup>72</sup> The Fifth District never reached the second inquiry, whether enforcement of the UCRA compelled speech in this case, because it held that in this instance, the cake that defendants refused to bake for the couple was not an expressive activity protected by the First Amendment.<sup>73</sup> Specifically, the Fifth District held that baking a pre-designed, plain white cake with no writing, images, symbols, or other indicia of a wedding “did not have any qualities signaling its preparation was primarily a self-expressive act of the baker/decorator.”<sup>74</sup> Likewise, the act of providing a pre-designed wedding cake for use at a same-sex wedding is not “expressive conduct” protected by the First Amendment.<sup>75</sup>

Importantly, the Fifth District recognized that there may be some circumstances where the provision of a wedding cake does constitute expressive conduct to which the First Amendment would

apply.<sup>76</sup> Specifically, the Fifth District noted that the U.S. Supreme Court has held that businesses engaged in pure speech may withhold their services for same sex marriages in certain circumstances.<sup>77</sup> Accordingly, this case emphasizes that the interplay between the First Amendment and the UCRA will be a fact-specific inquiry for which the details of the conduct at issue will be paramount.

It seems likely there will be more litigation in state and federal court as to when businesses may refuse to provide certain services to customers based on the customer’s sexual orientation, although how that litigation plays out remains to be seen.

## ENDNOTES

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3. **Jenna Zhang** is an associate at Covington & Burling. She is a member of the firm’s data privacy and cybersecurity practice group and a 2020 graduate of Berkeley Law School.
4. Civ. Code, § 51 (UCRA).
5. *Cassirer v. Thyssen-Bornemisza Collection Foundation* (2022) 596 U.S. 107 (*Cassirer*).
6. *Cassirer v. Thyssen-Bornemisza Collection Foundation* (9th Cir. 2024) 89 F.4th 1226, 1234–1236, cert granted Marc. 10, 2025, No. 24-652, \_\_\_ U.S. \_\_\_ [145 S.Ct. 1331, 221 L.Ed.2d 413] (Mem.).
7. *Id.* at p. 1245.
8. Code Civ. Proc., § 338.2.
9. *Ibid.*; see also Assem. Bill No. 2867 (2023–2024 Reg. Sess.) § 5.
10. *Cassirer, supra*, 145 S.Ct. 1331.
11. *Ibid.*
12. *Cassirer v. Thyssen-Bornemisza Collection Foundation* (9th Cir. 2025) 135 F.4th 1175 (Mem.).
13. *Cassirer v. Thyssen-Bornemisza Collection Foundation* (C.D.Cal. Nov. 17, 2025) No. 2:05-cv-3459, Dkt. 701;

- Cassirer v. Thyssen-Bornemisza Collection Foundation* (C.D.Cal. Sept. 12, 2025) No. 2:05-cv-3459, Dkt. 681-1, at pp. 2–3.
14. *Cassirer v. Thyssen-Bornemisza Collection Foundation* (C.D.Cal. Dec. 5, 2025), No. 2:05-cv-3459, Dkt. 712, at p. 2.
15. *Cassirer v. Thyssen-Bornemisza Collection Foundation* (C.D.Cal. Dec. 9, 2025), No. 2:05-cv-3459, Dkt. 713.
16. Pub. L. No. 114-308 (Dec. 16, 2016) 130 Stat. 1524 (HEAR Act).
17. *Id.* at § 5.
18. Sen. No. 1884, 119th Cong., 1st Sess. (2025), § 2(a).
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20. (9th Cir. 2025) 151 F.4th 1211, 1215.
21. *Id.* at pp. 1216–1217.
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23. *Ibid.*
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27. *Ibid.*
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39. *Id.* at pp. 1226–1227.
40. (9th Cir. 2025) 153 F.4th 957 (*Biani*).
41. *Id.* at p. 960.
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43. *Id.* at pp. 960–961.
44. *Id.* at p. 961.
45. *Ibid.*
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48. *Ibid.*
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51. *Ibid.*
52. *Ibid.*
53. *Id.* at p. 965.
54. *Ibid.*
55. (2018) 584 U.S. 617, 625.
56. *Civil Rights Dept. v. Cathy’s Creations, Inc.* (2025) 109 Cal. App.5th 204, 218–219; Civ. Code, § 51.
57. *Id.* at p. 223.
58. *Id.* at pp. 222–224.
59. *Id.* at pp. 222–223.
60. *Id.* at p. 224.
61. *Ibid.*
62. *Id.* at p. 225.
63. *Ibid.*
64. *Ibid.*
65. *Id.* at p. 219.
66. *Id.* at p. 234.
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69. *Id.* at p. 238.
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71. *Id.* at p. 240.
72. *Id.* at p. 243.
73. *Id.* at p. 260.
74. *Id.* at p. 257.
75. *Id.* at p. 260.
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77. *Ibid.* (citing *303 Creative LLC v. Elenis* (2023) 600 U.S. 570, 596).

# EMPLOYMENT LAW: SELECT CASES

Written by Kathleen A. Brewer\*



In 2025, the California Supreme Court and the Courts of Appeal published numerous decisions in employment cases. This article explores four significant cases that addressed wage and hour law, harassment under the Fair Employment and Housing Act<sup>1</sup>, and common law wrongful termination.

## WAGE AND HOUR

The California Supreme Court resolved two wage and hour issues in *Iloff v. LaPaille*.<sup>2</sup> First, the court set the standard for an employer's defense to the mandatory imposition of liquidated damages in a minimum wage case. That standard, under *Iloff*, requires an employer to prove that it "made a reasonable attempt to determine the requirements of the [minimum wage] law" and made a good faith effort to comply with those requirements.<sup>3</sup> Second, the court addressed whether an employee may bring a claim for sick pay under the Healthy Workplaces Healthy Families Act in the trial court as part of a de novo review of a Labor Commissioner's decision without first having brought the claim before the Labor Commissioner. Under *Iloff*, the answer is yes.

## THE "GOOD FAITH" DEFENSE TO LIQUIDATED DAMAGES IN MINIMUM WAGE CASES REQUIRES EMPLOYERS TO LEARN-OR AT LEAST TRY TO LEARN-THE APPLICABLE LAW

Under Labor Code section 1194.2, an employee who prevails on a claim for minimum wage violations is entitled to liquidated damages in an amount equal to the wages unlawfully withheld.<sup>4</sup> The award is mandatory unless the employer establishes a "good faith" defense. To prevail on that defense, the employer must "demonstrate[] to the satisfaction of the court or the Labor Commissioner" that the failure to pay minimum wage was done "in good faith" and with "reasonable grounds for believing" that it was not violating the Labor Code.<sup>5</sup> When the employer meets its good faith showing, the court may, "as a matter of discretion," deny or reduce a liquidated damages award.<sup>6</sup>

This statutory defense appears to confer broad discretion on trial courts<sup>7</sup> to determine whether the defense has been established and, if so, whether to grant or reduce the otherwise mandatory liquidated damages award. That is precisely how the Court of Appeal in *Iloff* understood a trial court's discretion. According to

the Court of Appeal, “to the court’s satisfaction” is the plumbline for determining whether a defendant has met its good faith burden. This deferential standard would give the trial court “considerable latitude” to assure itself that the employer acted in good faith when it failed to pay minimum wage.<sup>8</sup> It would allow the court to weigh many factors, including the parties’ expectations, the state of the law, and the employer’s subjective beliefs. The California Supreme Court disagreed with the appellate court’s view of a trial court’s discretion, and its ability to consider circumstances, when analyzing the good faith defense.

First, the Supreme Court took issue with the appellate court’s “misconstruction of the phrase ‘to the satisfaction of the court.’”<sup>9</sup> That phrase “simply indicates that an award of liquidated damages ‘is to be granted, or denied, by the court, as opposed to the jury.’”<sup>10</sup> It does not suggest that a court has discretion to determine whether a defendant has established the good faith defense. That determination is made by applying the law to the facts; it is not a matter of judicial discretion.<sup>11</sup> The trial court’s discretionary latitude kicks in when deciding, after the employer has established the good faith defense, whether to award and/or reduce liquidated damages.<sup>12</sup>

Second, the Supreme Court supplied the framework for determining whether an employer has established the good faith defense. Foundationally, the employer must demonstrate that it “made a reasonable attempt to determine the requirements of the law governing minimum wages.”<sup>13</sup> Without a reasonable effort to ascertain the law, the good faith defense fails. If the employer meets the “reasonable attempt” prong, it must then show that it made “a good faith effort to comply with the requirements of the law.”<sup>14</sup> A trial court may consider a variety of factors when determining whether the second prong is met, but it may not reach that part of the analysis until the employer has demonstrated its reasonable efforts to ascertain the law.

In *Iloff*, the trial court relied primarily on the expectation of the parties to determine whether

the employer acted in good faith when it failed to pay minimum wage.<sup>15</sup> The parties had freely entered what they considered an independent contractor relationship under which Iloff would perform maintenance work without compensation in exchange for rent-free housing. The trial court found that Iloff was an employee, not an independent contractor, entitled to minimum wage compensation. However, the court viewed the failure to compensate as reasonable and done in good faith, given the parties’ mutual expectations. Therefore, liquidated damages were not awarded.

The appellate court deferred to the trial court’s determination because “some facts” suggested that the employer could reasonably have viewed Iloff as an independent contractor.<sup>16</sup> Notably, the appellate court observed that the law regarding independent contractor status was “unsettled” during the relevant time period, further supporting the good faith determination.<sup>17</sup> The Supreme Court eliminated all of these factors from the first prong of the good faith test. An employer will be on the hook for liquidated damages if it made no reasonable effort to learn its obligations under the law regardless of how unsettled the law was or how “reasonable” its minimum wage violation seemed at the time.

## **RECOVERING SICK PAY UNDER THE HEALTHY WORKPLACES, HEALTHY FAMILIES ACT: DESPITE HAVING NO PRIVATE RIGHT OF ACTION, AN EMPLOYEE CAN COMMENCE A SICK PAY CLAIM IN SUPERIOR COURT AS PART OF DE NOVO REVIEW**

The plaintiff in *Iloff* initiated his wage claims by filing a complaint with the Labor Commissioner rather than by filing a civil action.<sup>18</sup> Claims submitted to the Labor Commissioner are adjudicated through the administrative “Berman” process, which provides for an evidentiary hearing and issuance of “an order, decision or award.”<sup>19</sup> Parties may challenge the administrative outcome by appealing to the superior court, which will hear the case de novo.<sup>20</sup> A trial court conducting the review gives “no weight whatsoever” to the Commissioner’s ruling or findings. The de novo proceedings are “a trial anew

in the fullest sense” and are subject to conventional appellate review.<sup>21</sup>

In *Iloff*, the Labor Commissioner found in favor of the employee on the wage claims, and the employer sought de novo review in the superior court. In court, *Iloff* asserted both the wage claims and a new claim under the Healthy Workplaces, Healthy Families Act (“Paid Sick Leave law”).<sup>22</sup> California’s Paid Sick Leave law requires employers to provide eligible employees<sup>23</sup> with a certain number<sup>24</sup> of paid sick days per year. The Paid Sick Leave law does not provide a private right of action.<sup>25</sup> Employees may vindicate their rights under this law only through the Labor Commissioner’s Berman process.<sup>26</sup> Because *Iloff* had not pursued the Paid Sick Leave claim with the Labor Commissioner and was not entitled to initiate such a claim as a civil lawsuit, the trial and appellate courts rejected the claim as part of the de novo appeal. The Supreme Court reversed.

First, the high court noted that, under *Murphy v. Kenneth Cole Productions*,<sup>27</sup> an employee facing de novo appeal of a Labor Commissioner’s favorable ruling may add claims that had not been adjudicated in the earlier proceeding. The added claims in *Murphy*, unlike the added claim in *Iloff*, were subject to a private right of action and could, therefore, have been filed in “a separate civil complaint.”<sup>28</sup> The *Murphy* court saw no sense in requiring the employee to file a separate lawsuit containing the new claims and consolidating that lawsuit with the de novo review, rather than simply permitting the trial court to hear the new claims as part of the de novo proceeding.

In *Iloff*, the employee could not have filed the new claim as a separate lawsuit. However, because the Labor Commissioner or the Attorney General may bring a civil enforcement action for violations of the Paid Sick Leave law,<sup>29</sup> the *Iloff* court adopted *Murphy*’s rationale: “It is ‘unclear what interest would be served’ by requiring the Labor Commissioner or the Attorney General to raise a Paid Sick Leave law claim in a separate lawsuit rather than allowing the employee . . . to raise the claim in response to

the employer’s appeal of the Labor Commissioner’s ruling.”<sup>30</sup>

More fundamentally, the Supreme Court addressed the appellate court’s misinterpretation of the statute’s enforcement mechanisms and its erroneous concept of “a private right of action.” The Paid Sick Leave law authorizes the Labor Commissioner to enforce its provisions through the procedures set forth in certain Labor Code sections, including section 98, which provides for the Berman process.<sup>31</sup> Upon completion of the Berman process, section 98.2 permits de novo review in superior court (the “Berman appeal”)<sup>32</sup>. According to the Court of Appeal in *Iloff*, the absence of section 98.2 from the list of enforcement procedures meant that de novo review was not available after Berman hearings on Paid Sick Leave claims.<sup>33</sup> The appellate court also opined that access to de novo review would have read a private right of action into the statute. Absence of that access, the Supreme Court found, confirms that “there is no private right of action” for Paid Sick Leave claims.<sup>34</sup>

The Supreme Court corrected fundamental defects in this reasoning. First, the Legislature had no need to list section 98.2’s Berman appeal as a mechanism for enforcing the Paid Sick Leave law. It needed only to list section 98’s Berman hearing because the Berman appeal is available to all parties after a Berman hearing.<sup>35</sup> Second, under the Court of Appeal’s interpretation, “an employer’s appeal would automatically deprive the employee of the ability to recover on a Paid Sick Leave law claim that the Labor Commissioner had found meritorious.”<sup>36</sup> An appeal to superior court nullifies the Commissioner’s award and permits recovery only on claims raised de novo to the court. An employer could avoid a meritorious Paid Sick Leave claim simply by filing an appeal—a result that is both incongruous and repugnant to the policies underlying the act.<sup>37</sup> Third, the Court of Appeal apparently “conflated a Berman appeal with a ‘private right of action.’”<sup>38</sup> A Berman appeal “is not a ‘private right of action.’”<sup>39</sup> It does not authorize an employee to file suit directly in court; it authorizes an appeal from the Labor Commissioner’s administrative ruling.<sup>40</sup> Allowing employees, like

loff, to pursue claims on de novo review that were not raised in the administrative hearing “does not transform the Berman appeal into a private right of action.”<sup>41</sup>

Under *Iloff*, employers must take care to learn their legal obligations, particularly regarding the payment of minimum compensation, and to remember that appealing a Berman ruling can expose them to new claims.

## HARASSMENT UNDER FEHA

### WHETHER SEXUAL HARASSMENT IS INDIRECT, OFFSITE, “SUNG, SHOUTED OR WHISPERED,” EMPLOYERS MUST RESPOND EFFECTIVELY TO COMPLAINTS

If offsite coworker harassment is not actionable against an employer, does the employer have a duty under FEHA to take corrective action? According to *Kruitbosch v. Bakersfield Recovery Services, Inc.*,<sup>42</sup> the answer is yes. The failure to act can itself constitute unlawful sexual harassment. The Court of Appeal in *Kruitbosch* addressed two key issues. First, the court broke ground on a question of first impression: When will offsite harassment by a coworker be actionable against an employer?<sup>43</sup> Under *Kruitbosch*, an employer is not liable for such harassment unless it was responsible in some manner for creating or endorsing the context in which the harassment occurred. Second, the court heralded a new approach to employer liability for sexual harassment: Even if the underlying harassment is not actionable under FEHA, a lackluster or improper response can independently create a viable harassment claim.

Under another 2025 case, *Carranza v. City of Los Angeles*,<sup>44</sup> FEHA liability can attach for harassment that an employee experiences indirectly. *Carranza* also emphasized that an employer’s ineffective response can contribute to the severity and pervasiveness of workplace harassment.

Together, these cases articulate standards that seem to both limit and expand FEHA’s protections.

### CONSTRICTING THE “AMBIT OF FEHA”: FEHA PROTECTIONS DO NOT READILY EXTEND TO OFFSITE HARASSMENT BY A COWORKER

The plaintiff in *Kruitbosch* alleged that a coworker subjected him to multiple sexual advances and crude sexual comments, he reported the harassment to management, and no corrective action was taken. Under FEHA, employer liability for severe or pervasive coworker harassment attaches if the employer knew or should have known about the misconduct and failed to take immediate, appropriate corrective action.<sup>45</sup> Because the harassment occurred outside the physical worksite, the Court of Appeal in *Kruitbosch* imposed an additional requirement: the harassing conduct must have been, “in some fashion, work related.”<sup>46</sup>

The work-relatedness requirement derives from cases testing employer liability for offsite harassment by supervisors. Early cases recognized that, while actionable harassment “may and often does occur at the place of work, it need not.”<sup>47</sup> Harassment “perpetrated by an agent, supervisor, or coworker, which occurs elsewhere but is in some fashion work-related,” can also constitute unlawful harassment “within the meaning of FEHA.”<sup>48</sup> To determine work-relatedness, courts considered a number of factors centered on the employer’s involvement in creating, endorsing, or benefiting from the offsite context in which the harassment occurred.<sup>49</sup>

Later cases focused on whether the offsite harassment was rooted in a personal relationship between the two employees. The personal relationship prong rests on a footnote in *State Department of Health Services v. Superior Court*,<sup>50</sup> where the California Supreme Court observed: “The employer is not strictly liable for a supervisor’s acts of harassment resulting from a completely private relationship unconnected with the employment and not occurring at the workplace or during normal working hours.”<sup>51</sup> Although the statement in *Health Services* is entirely dicta,<sup>52</sup> it spawned something of a litmus test for determining work-relatedness. As one leading case observed, citing *Health Services*,

“in order for the employer to avoid strict liability for the supervisor’s actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor’s actions . . . .”<sup>53</sup>

*Kruitbosch* is the first decision to address the “work-related” issue in the context of offsite *coworker* harassment under FEHA. The Court of Appeal adopted a multi-factor test based on the factors considered by other courts when assessing the work-related nature of a *supervisor’s* offsite harassing conduct. Under *Kruitbosch*, the four relevant factors are whether the harassment occurred (1) in or through a venue or modality paid for by the employer; (2) in circumstances the employer had arranged or approved; (3) in a context where the employer was expected to derive some benefit; or (4) in employment-related social circumstances where employees would be expected to interact.<sup>54</sup> Notably, the court did not include the existence of a personal relationship among the factors. The court recognized that “a personal relationship is a necessary element” for avoiding employer liability in the supervisor context.<sup>55</sup> However, in the non-supervisor context, according to the court, the personal relationship question “does not take on the same importance.”<sup>56</sup>

In *Kruitbosch*, the harassing coworker and the harassed plaintiff had no personal relationship. They “knew each other only through work.”<sup>57</sup> “Through work,” the coworker obtained the plaintiff’s cellphone number and home address. The coworker sent sexual pictures, suggestive texts and sexual propositions to the plaintiff’s cellphone, appeared at the plaintiff’s home to proposition him for sex, and left a sexually explicit object on his driveway. The harassment did not arise from a friendship or dating relationship; it stemmed solely from the workplace. The plaintiff reported the harassment to management, which took no corrective action. Had these incidents occurred in the physical workplace, the employer’s inaction would have exposed it to liability under FEHA.<sup>58</sup> However, because the conduct occurred offsite, the employer would avoid

liability if the plaintiff failed to prove (or properly allege)<sup>59</sup> work-relatedness.

Analyzing the work-relatedness question under its four-factor test, the Court of Appeal found that the coworker’s conduct did “not involve work-related harassment.”<sup>60</sup> The harassment did not occur through an employer-provided modality or within a work-related event or in circumstances approved by the employer. Moreover, obtaining the plaintiff’s contact information through work did not make the coworker’s harassment work-related because the employer had not facilitated and did not benefit from the exchange of personal contact information.<sup>61</sup> Thus, the harassment was not work related, and the employer could not be held liable. The lack of personal relationship between the plaintiff and his alleged harasser bore no significance in the analysis.<sup>62</sup>

*Kruitbosch’s* approach to offsite coworker harassment cases is troubling in some respects. It provides for employer liability only where the employer was involved in creating or approving the context for the harassment, even where the coworkers have no relationship outside of work. The lack of personal relationship, which is critical in the supervisor context, should be part of the analysis in the coworker context. After all, the work-related requirement applies to offsite harassment “perpetrated by an agent, supervisor, or co-worker [sic].”<sup>63</sup> Thus, the factors to determine work-relatedness should be similar regardless of which type of actor commits the offense. The “personal relationship” issue goes to whether the harassment arose from the workplace or from an outside relationship—a relevant question in either context.

More importantly, the harassing employee, who can be individually liable under FEHA,<sup>64</sup> is not liable for offsite harassment that fails *Kruitbosch’s* work-relatedness test. Although the Court of Appeal did not address individual liability, its holding makes clear that offsite harassment falls outside “the ambit of FEHA,” if it is not work-related as defined by the opinion.<sup>65</sup> An employee’s conduct that is not within “the ambit of FEHA” cannot logically give

rise to individual liability under FEHA.<sup>66</sup> This leaves employees free, under FEHA at least, to express hateful biases toward coworkers through harassing conduct as long as they engage in such conduct off premises. An employee may, through work, gather personal information about a coworker, appear at the coworker's home to ask for sex, burn a cross on the front lawn, leave a sexual object on the driveway, or draw a swastika on the sidewalk. If the conduct is not "work-related" under the *Kruitbosch* test, the employee will not face personal liability under FEHA.

The *Kruitbosch* analysis also places undo emphasis on physical location. Conduct occurring anywhere "off the worksite" must be examined for employer involvement under the *Kruitbosch* factors.<sup>67</sup> The Court of Appeal made clear that even following a coworker home directly from work for harassing purposes is not work related and would not implicate FEHA.<sup>68</sup> This suggests that an employee who wishes to deliver discriminatory, harassing messages to a coworker may simply follow the coworker to the curb after work and conduct the harassment in the street. Protecting an employee from such mistreatment, under *Kruitbosch*, would not be within the ambit of FEHA unless the employer had arranged or benefitted from the context in which the harassment occurred.

The focus on physical location also disregards the realities of today's work world where coworkers often communicate at all hours of the day, both onsite and offsite, via text and social media. Any test for evaluating work-relatedness should bear in mind that "the modern workplace has expanded beyond the traditional definition of the shop floor."<sup>69</sup> Limiting the scope of FEHA protection to the physical "shop floor" (absent employer involvement) may give employees wide berth to stalk and harass one another off premises without implicating FEHA.

Perhaps a better approach is the one recently articulated by the Ninth Circuit in *Okonowsky v. Garland*.<sup>70</sup> Under that standard, offsite harassment is not treated much differently from onsite harassment. The analysis does not center on the employer's involvement in creating or facilitating

the circumstances leading to the harassment. Under *Okonowsky*, the question is whether "the harassing conduct had an unreasonable effect on the working environment and, if so, [ ] whether and how the employer responded to that effect."<sup>71</sup> Although *Kruitbosch* cited the *Okonowsky* standard with approval, the Court of Appeal did not apply that standard to the offsite harassment claim before it.<sup>72</sup> Instead, the court applied a formulaic test that ignored *Okonowsky's* core question: whether the harassment detrimentally affected the plaintiff's work environment. (The work environment question arose only in connection with a separate harassment claim against the employer, as discussed below). Focusing exclusively on the employer's non-involvement in the offsite activity, *Kruitbosch* found no liability under FEHA for the coworker's sexual harassment, despite the harassment's bruising effect on the plaintiff's work life.

## **EMPLOYERS, WATCH YOUR RESPONSES: FEHA LIABILITY CAN ATTACH FOR FAILURE TO ACT ON A HARASSMENT COMPLAINT THAT DOES NOT VIOLATE FEHA**

The plaintiff in *Kruitbosch* advanced the same liability theory that all FEHA plaintiffs must argue in order to establish employer liability for coworker harassment: that the employer knew about the harassment and failed to take "immediate and appropriate corrective action."<sup>73</sup> The failure to take such action imposes statutory liability under what courts treat as a negligence standard.<sup>74</sup> Thus, an employer is liable under FEHA for a non-supervisor's harassing conduct only if that conduct violated FEHA and the employer knew about it but failed to take appropriate remedial action.<sup>75</sup> Because the coworker harassment in *Kruitbosch* was not "within the ambit of FEHA," the employer could not have been liable under the "failure to correct" standard. However, its "failure to correct" exposed the employer to liability for creating a sexually harassing work environment.

The idea that an employer's failure to correct harassment that did not violate FEHA can support employer liability for harassment under FEHA is

somewhat novel. It is so unusual that the *Kruitbosch* plaintiff never raised it. The Court of Appeal itself directed the parties to brief the question.<sup>76</sup> Although some recent courts have found that employer responses to harassment complaints can exacerbate and become part of actionable conduct,<sup>77</sup> *Kruitbosch* appears to be the first case to hold that an employer's response to nonactionable conduct can constitute unlawful harassment under FEHA.<sup>78</sup>

The employer's "harassing" conduct in *Kruitbosch* consisted of three acts. First, a managing employee told the plaintiff that "there was not much she could do about" the offsite harassment.<sup>79</sup> Second, an HR representative, after being informed of the harassment complaint, posted a video of whining dogs on social media with a statement comparing the video to a day at the office. Third, the HR rep told the plaintiff, "I hope you don't get no more pictures."<sup>80</sup> The employer took no steps to discipline the alleged harasser or prevent future harassment. Although the plaintiff experienced no further harassment, the company's failure to address his complaints, combined with the HR representative's mockery and the severity of the coworker's sexual misconduct, triggered such anxiety that the plaintiff feared going to work. The employer's response, although it could not support liability for the offsite harassment, could be viewed as condoning that behavior and "as altering plaintiff's working environment in an objectively severe manner."<sup>81</sup> In that situation, employer liability for workplace harassment, but not for the more severe offsite harassment, can go to trial.

## **SECONDHAND KNOWLEDGE AND A "CHAIN OF INTERPERSONAL INTERACTIONS": HOW INDIRECT COWORKER HARASSMENT CAN VIOLATE FEHA**

The plaintiff in *Carranza v. City of Los Angeles*,<sup>82</sup> a captain with the Los Angeles Police Department, suffered an unlawful hostile work environment because of sexual harassment she experienced "secondhand."<sup>83</sup> LAPD personnel had been circulating a photo of a topless woman, falsely claiming the photo depicted the plaintiff, and making lewd comments about the plaintiff when looking

at the photo. No employee "ever directly joked about the photo to [plaintiff], directly harassed [plaintiff,] or made derogatory comments to her."<sup>84</sup> Carranza learned about circulation of the photo through an outside source.<sup>85</sup> Later, Carranza learned through an employee of an incident where three officers were looking at the photo while making vulgar comments about Carranza. The employee also informed Carranza that the photo was a "hot subject" about which people "everywhere" were talking.<sup>86</sup> From this information Carranza reasonably believed that "dozens, if not hundreds" of LAPD officers were passing the photo around and making her the subject of their lascivious talk.<sup>87</sup> Reasonably believing that potentially hundreds of employees were making sexual comments about her, without having heard those comments herself, created a sexually hostile work environment for the plaintiff that violated FEHA.

Although harassment generally refers to "bias that is expressed through interpersonal relations,"<sup>88</sup> in *Carranza*, the Court of Appeal found that harassment through "a chain of interpersonal interactions," such as an employee's learning of the misconduct through others who witnessed it, satisfies FEHA.<sup>89</sup> The *Carranza* court made clear what is *not* required to maintain a sexual harassment claim under FEHA. A FEHA plaintiff need not: have had any direct interaction with a harasser; have "experienced direct 'sexual hostility in her day-to-day work environment'"; have been "'assaulted, threatened, propositioned, subjected to physical contact, or subjected to explicit language in her presence.'"<sup>90</sup> In sum, a FEHA plaintiff need not have been "harassed to her face."<sup>91</sup>

As in *Kruitbosch*, the Court of Appeal in *Carranza* considered the employer's response to the plaintiff's complaints of harassment. The plaintiff had repeatedly asked the department to stop circulation of the photo, inform department members that the photo did not depict her, and ascertain and discipline the perpetrators. The department's failure to take corrective action not only supported its liability for the coworker harassment, but it contributed

to the harassment’s severity and compounded the plaintiff’s distress.

The department’s inaction was not excused by its need to exercise discretion in addressing circulation of the embarrassing photo or by the backroom nature of the misconduct. Employers may not allow backroom, or whispered, harassment to go unchecked. “FEHA does not reward discretion in harassing behaviors. Rather, it protects victims from workplace environments poisoned by inappropriate conduct—whether “sung, shouted, or whispered.”<sup>92</sup>

## WRONGFUL TERMINATION

### MAY AN EMPLOYER FIRE AN EMPLOYEE FOR FAILING A COMPULSORY POLYGRAPH? NOT WITHOUT FACING A WRONGFUL TERMINATION SUIT

California law has long prohibited compelled polygraph tests in the employment context. Under Labor Code section 432.2, employers<sup>93</sup> may not require an applicant or employee to take “a polygraph, lie detector or similar test<sup>94</sup> or examination as a condition of employment or continued employment.”<sup>95</sup> An employer may ask an employee or applicant to voluntarily take such a test, but the employer must first provide written notice of the rights guaranteed by section 432.2.<sup>96</sup>

An employee’s recourse for a violation of section 432.2 has been unclear and limited. The statute does not create a private right of action, which would permit employees to sue for its violation.<sup>97</sup> Nor may an employee complain to the Labor Commissioner, who lacks jurisdiction over section 432.2 violations.<sup>98</sup> Forced submission to a polygraph test in violation of section 432.2 would likely support a common law invasion of privacy claim<sup>99</sup>—an indirect path for addressing the statutory violation. A more direct route, although still a common law claim, is now available under *McDoniel v. Kavry Management, LLC*.<sup>100</sup> Under *McDoniel*, an employee who is terminated for failing a compelled polygraph (or for refusing to take the test) may sue for wrongful

termination in violation of public policy (a *Tameny* claim).<sup>101</sup>

The employer in *McDoniel*, after discovering a theft in the workplace, pressured the plaintiff-employee to take a polygraph test without advising the employee of his right to refuse. The employee, who was “uneasy” during the exam, “failed” the polygraph. After learning of the failed test, the employer fired the employee, prompting the employee to file, among other causes, a *Tameny* wrongful termination claim. The issue addressed and resolved in *McDoniel* was whether the policy embodied in section 432.2 is the type of public policy that can support a *Tameny* claim. The Court of Appeal held that it is.

A plaintiff bringing a *Tameny* claim must prove a termination (or other adverse action)<sup>102</sup> that “was substantially motivated by a violation of public policy.”<sup>103</sup> The policy violated must meet four requirements. It must: (1) be predicated on “constitutional or statutory provisions [or regulations enacted under statutory authority]”; (2) be “‘public’ in the sense that it ‘inures to the benefit of the public’ rather than serving merely the interests of the individual”; (3) have been well established at the time of the discharge; and (4) be “‘fundamental’ and ‘substantial.’”<sup>104</sup> The Court of Appeal in *McDoniel* had no trouble finding that section 432.2 expresses an important public policy that meets these requirements. The policy against forced polygraph exams is statutory, inures to the benefit of “all private-sector employees,” has been codified since 1963, and safeguards a right deemed by our society and our Supreme Court to be fundamental—the right to individual privacy.<sup>105</sup> Employees suffering adverse employment action for failing a compulsory polygraph or for refusing to take such a test<sup>106</sup> may now bring a *Tameny* claim.<sup>107</sup>

### GETTING CREATIVE WITH REQUESTS FOR ATTORNEY’S FEES: HOW ABOUT THE ANTI-FORCED-ARBITRATION STATUTE?

Prevailing party attorney’s fees are not available on a *Tameny* claim, which is a common law tort.<sup>108</sup> To recover attorney’s fees, the plaintiff in *McDoniel*

offered a creative argument under Labor Code section 432.6—an argument accepted by the trial court but rejected on appeal. Section 432.6, a relatively new addition to the Labor Code, prohibits conditioning employment, continued employment or employment benefits on the waiver of “any right, forum or procedure” to which an employee is entitled under FEHA or under the Labor Code.<sup>109</sup> The statute establishes a private right of action and prevailing plaintiff attorney’s fees.<sup>110</sup> McDoniel argued that, by being forced to take a polygraph test, he was being forced to waive a right under the Labor Code (to be free from compulsory lie detection testing) and that he should recover fees under section 432.6.

The Court of Appeal rejected the plaintiff’s reliance on section 432.6 because that section applies only to employment contracts entered after January 1, 2020, and McDoniel entered his contract in 2018. The court also addressed the substance of the argument and found that 432.6 did not apply. McDoniel, according to the court, could not have waived the right to be free from compulsory polygraph testing because he did not know he had that right. “Waiver is the intentional relinquishment of a known right . . . .”<sup>111</sup> McDoniel claimed during trial that the employer never informed him of the right to refuse, and, had he known of the right, he would not have submitted to the polygraph. According to the Court of Appeal, one cannot “waive, or intentionally relinquish, a known right” when he “had no knowledge of” the right.<sup>112</sup>

This discussion of section 432.6 is notable because, as the Court of Appeal observed, the section was enacted to address a particular practice that concerned the Legislature: “forcing workers, as a condition of hire, to agree to mandatory, binding arbitration of any future legal disputes . . . .”<sup>113</sup> Section 432.6 is essentially an anti-forced-arbitration statute. It forbids conditioning employment on the waiver of any “forum or procedure” normally available to employees for adjudication of rights under FEHA or the Labor Code.<sup>114</sup> Under Ninth Circuit precedent, section 432.6 is preempted by the Federal Arbitration

Act “to the extent it applies to arbitration agreements.”<sup>115</sup> However, the statute contains a single word—the word, “right”—that could be read as extending its purview beyond the forced arbitration context. Subdivisions (a) and (b) protect against the forced waiver of “any right” an employee has “for a violation of any provision of the California Fair Employment and Housing Act . . . or this code.”<sup>116</sup> This language seems to indicate an intent to protect the vindication of any right under FEHA and the Labor Code. If so, section 432.6 would provide a new enforcement mechanism for employees who are required to waive employment rights.

## ENDNOTES

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1. Gov. Code, § 12900, et seq. (FEHA).
2. (2025) 18 Cal.5th 551 (*Iloff*).
3. *Id.* at pp. 561, 566.
4. Lab. Code, § 1194.2, subd. (a).
5. *Id.* at subd. (b).
6. *Ibid.*
7. A request for liquidated damages may be made, and the good faith defense asserted, in both Labor Commissioner hearings and civil actions. See *id.* at subds. (a), (b).
8. *Iloff, supra*, 18 Cal.5th at p. 565.
9. *Ibid.*
10. *Id.* at pp. 565–566 (citing *McClanahan v. Mathews* (6th Cir. 1971) 440 F.2d 320, 322).
11. *Id.* at p. 566.
12. *Ibid.*
13. *Ibid.*
14. *Id.* at p. 561.

15. *Seviour-Iloff v. LaPaille* (2022) 80 Cal.App.5th 427, 449 (*Seviour-Iloff*) (“Here, the [trial] court primarily focused on the lack of expectation or understanding by all parties that wages were required to be paid.”).
16. *Iloff, supra*, 18 Cal.5th at p. 566.
17. *Ibid.*
18. Employees pursuing most wage-related claims have two options. They “may seek *judicial* relief by filing an ordinary civil action against the employer . . . [or they] may seek *administrative* relief by filing a wage claim with” the Labor Commissioner. *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1115 (*Murphy*) (citations omitted).
19. Lab. Code, § 98, subd. (f).
20. Lab. Code, § 98.2, subd. (a).
21. *Murphy, supra*, 40 Cal.4th at p. 1116.
22. Lab. Code, § 245, et seq. See *Iloff, supra*, 18 Cal.5th at p. 558 (dubbing the Healthy Workplaces, Healthy Families Act the “Paid Sick Leave law”).
23. Generally, any employee who “works in California for the same employer for 30 or more days within a year” is eligible. Lab. Code, § 246, subd. (a)(1). This includes employees who are exempt from overtime requirements as executive, administrative or professional employees. See *Id.* at subd. (b)(2). The statute lists five narrow employment categories that are exempt from the paid sick day requirements. Lab. Code, § 245.5, subd. (a).
24. The statutory accrual rate is one hour per every thirty hours worked. *Id.* at subd. (b)(1).
25. See *Wood v. Kaiser Foundation Hospitals* (2023) 88 Cal. App.5th 742, 757 (noting the Legislature’s decision to delete authorization for a private right of action).
26. *Iloff, supra*, 18 Cal.5th at p. 573 (“Without a private right of action, employees are left with the Berman process as their sole avenue for vindicating their rights under the Paid Sick Leave law.”). The Supreme Court in *Iloff* noted that employees may bring a PAGA claim based on a failure to comply with the Paid Sick Leave law, but PAGA actions do “not allow an employee to seek relief equivalent to that available through the Berman process.” *Id.* at p. 574, fn. 5.
27. *Murphy, supra*, 40 Cal.4th 1094.
28. *Id.* at p. 1118.
29. Lab. Code, § 248.5, subd. (e).
30. *Iloff, supra*, 18 Cal.5th at p. 574 (citing *Murphy, supra*, 40 Cal.4th at p. 1118).
31. Lab. Code, § 248.5, subd. (a). The listed procedures are those set forth in sections: 98 (Berman hearings for wage-related complaints); 98.3 (prosecution of wage-related complaints); 98.7 (investigation of retaliation complaints); 98.74 (hearings on retaliation complaints); and 1197.1 (investigation of minimum wage violations).
32. *Iloff, supra*, 18 Cal.5th at p. 571.
33. *Seviour-Iloff, supra*, 80 Cal.App.5th at pp. 450–451.
34. *Id.* at p. 451.
35. *Iloff, supra*, 18 Cal.5th at p. 571 (“When the Labor Commissioner holds a Berman hearing under section 98, the parties are entitled to appeal the Labor Commissioner’s ruling under section 98.2.”).
36. *Ibid.*
37. *Ibid.*
38. *Id.* at p. 573.
39. *Ibid.*
40. *Ibid.*
41. *Ibid.*
42. (2025) 114 Cal.App.5th 200 (*Kruitbosch*).
43. The appellate court recognized it was addressing an issue of first impression with respect to offsite coworker harassment under FEHA: “The parties have cited no FEHA cases that explore whether the harassing conduct of a nonsupervisory *coworker* occurring *away from the workplace* is imputable to the employer, and our research has revealed none in this context.” *Id.* at p. 217.
44. (2025) 111 Cal.App.5th 388 (*Carranza*).
45. Gov. Code, § 12940, subd. (j)(1). Where the harassing employee is a supervisor or agent, the employer’s liability is strict. *Ibid.* See *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042 (*Health Services*) (“under the FEHA, an employer is strictly liable for *all* acts of sexual harassment by a supervisor”).
46. *Kruitbosch, supra*, 114 Cal.App.5th at p. 213.
47. *Capital City Foods, Inc. v. Superior Court* (1992) 5 Cal. App.4th 1042, 1048 (citing *DFEH v. Huncot Properties* (Dec. 15, 1988) FEHC Dec. No. 88–21, at p. 8).
48. *Ibid.*
49. See *Kruitbosch, supra*, 114 Cal.App.5th at pp. 213–217 (discussing cases).
50. *Supra*, 31 Cal.4th 1026.
51. *Id.* at p. 1041, fn. 3.
52. *Health Services* addressed an employer’s strict liability under FEHA and application of the avoidable

- consequences defense. The issue of offsite harassment was not present in the case.
53. *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal. App.4th 1403, 1421 (citing *Health Services, supra*, 31 Cal.4th at p. 1041, fn. 3). More recently, an appellate court affirmed summary judgment in an employer's favor where the sexual harassment consisted of text messages occurring outside the workplace and arising from a "personal texting relationship." *Atalla v. Rite Aid Corp.* (2023) 89 Cal.App.5th 294, 319.
  54. *Kruitbosch, supra*, 114 Cal.App.5th at pp. 218–219.
  55. *Id.* at p. 219.
  56. *Ibid.*
  57. *Ibid.*
  58. Gov. Code, § 12940, subd. (j).
  59. The case was appealed on a dismissal after a sustained demurrer.
  60. *Kruitbosch, supra*, 114 Cal.App.5th at p. 220.
  61. Because the communications between these two coworkers were "primarily about work-related matters" (*id.* at p. 213), the exchange of personal cell phone numbers would presumably have been for work-related reasons—reasons that benefitted the employer. The trial court did not address this issue; nor did the parties raise it, apparently.
  62. Without elaboration, the appellate court noted, "The mere fact Sanders [the harasser] and plaintiff knew each other only through work does not make Sanders's conduct toward plaintiff work related . . ." *Id.* at p. 219.
  63. *Id.* at p. 212 (citing *Capitol City Foods, supra*, 5 Cal. App.4th at p. 1048) (emphasis added).
  64. Gov. Code, § 12940, subd. (j)(3).
  65. *Kruitbosch, supra*, 114 Cal.App.5th at p. 207 (The misconduct at issue in the case "was not sufficiently work related *within the ambit of FEHA.*") (emphasis added).
  66. Gov. Code, § 12940, subd. (j)(3) (An employee "is personally liable for any harassment *prohibited by this section* that is perpetrated by the employee . . .") (emphasis added).
  67. *Kruitbosch, supra*, 114 Cal.App.5th at p. 212 (citing *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1016, fn. 14 *Farmers*). Notably, *Farmers* was distinguishing between employer liability under FEHA and employer liability under respondeat superior principles, which do not apply to FEHA liability determinations (although they may provide guidance on "scope of employment" questions in offsite harassment cases).
  68. The appellate court observed that "surreptitiously follow[ing] [a coworker] home from the workplace" does not constitute work-related conduct. *Kruitbosch, supra*, 114 Cal.App.5th at p. 219.
  69. Daniel V. Johns, *Toward A More Modern Application of the "Nexus to the Workplace" Test: Arbitral Considerations in Off-Duty Employee Misconduct Cases* (2017) 23 Harv. Negot. L.Rev. 1, 5 ("Whether described as 'virtual' or never-ending, the modern workplace has expanded beyond the traditional definition of the shop floor.").
  70. (9th Cir. 2024) 109 F.4th 1166 (*Okonowsky*).
  71. *Id.* at p. 1180.
  72. *Kruitbosch, supra*, 114 Cal.App.5th at p. 219.
  73. Gov. Code, § 12940, subd. (j).
  74. *Kruitbosch, supra*, 114 Cal.App.5th at p. 217 ("[A]ssessment of an employer's liability under a negligence standard considers whether the employer knew or should have known of the conduct and failed to act").
  75. See CACI No. 2521A (2025 ed.) (setting forth the elements of a FEHA hostile environment claim against an employer).
  76. *Kruitbosch, supra*, 114 Cal.App.5th at p. 220.
  77. See, e.g., *Bailey v. San Francisco Dist. Attorney's Office* (2024) 16 Cal.5th 611, 637–640 (*Bailey*) (employer's response to harassment complaint was obstructive and hostile, constituting not only a potential failure to correct under Government Code section 12940, subdivision (j), but a series of adverse actions potentially supporting a retaliation claim under subdivision (k)); see also *Carranza, supra*, 111 Cal. App.5th at p. 404 (employer's inaction compounded the harassed employee's distress).
  78. But see *Okonowsky, supra*, 109 F.4th at p. 1181 (*under Title VII*, an employer's response to a complaint of harassment can contribute to "the cumulative effect of the conduct" *and can itself* "form the basis for a hostile work environment claim") (citing *Fuller v. Idaho Department of Corrections* (9th Cir. 2017) 865 F.3d 1154, 1163–64) (emphasis added).
  79. *Kruitbosch, supra*, 114 Cal.App.5th at p. 208.
  80. *Id.* at p. 209.
  81. *Id.* at p. 223.
  82. *Carranza, supra*, 111 Cal.App.5th 388.
  83. *Id.* at p. 393.
  84. *Id.* at p. 397.

85. Carranza learned of the photo through a call from her attorney, who also represented the association for LAPD commanding officers. *Id.* at p. 393.
86. *Id.* at pp. 394–395.
87. *Id.* at p. 403.
88. *Id.* at p. 406 (citing *Bailey, supra*, 16 Cal.5th at p. 627).
89. *Ibid.* (emphasis added).
90. *Ibid.*
91. *Ibid.* Importantly, the Court of Appeal does not suggest that harassment of third persons outside the presence of the plaintiff would support a FEHA harassment claim. See *id.* at p. 407, fn. 7.
92. *Id.* at p. 407 (citation omitted).
93. On its face, the statutory prohibition applies only to private employers. Lab. Code, § 432.2, subd. (a). However, the California Supreme Court has held that, by establishing a dual classification that provides different rights to public and private employees, and doing so without compelling justification, section 432.2 violates the equal protection rights of public employees. *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d. 937, 948–956 (*Long Beach*).
94. Presumably, “similar tests” would include the “deceptograph, voice stress analyzer, psychological stress evaluator” and other devices used “for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual,” as described in definition section of the federal Employee Polygraph Protection Act. 29 U.S.C. § 2001(3) (EPPA).
95. Lab. Code § 432.2, subd. (a).
96. *Id.* at subd. (b).
97. Unlike the federal EPPA, which specifically authorizes civil actions by employees (29 U.S.C. § 2005), section 432.2 does not create a private right of action. In cases where employees have filed suit directly under section 432.2, courts have not squarely addressed the private right of action issue. For example, the employee in *McDoniel v. Kavry Management, LLC* filed and tried a section 432.2 claim. (2025) 114 Cal.App.5th 949, 960, 968 (*McDoniel*). Finding the damages award proper on the wrongful discharge claim, the court “deem[ed] it unnecessary” to decide whether “a violation of section 432.2 provided an alternate ground for” the award. *Id.* at p. 968, fn. 14.
98. One case includes section 432.2 violations among matters not subject to the Labor Commissioner’s jurisdiction. *Rebolledo v. Tilly’s, Inc.* (2014) 228 Cal. App.4th 900, 915.
99. Compelling a person to communicate thoughts and emotions invades a “quintessential zone of human privacy”—the mind. *Long Beach, supra*, 41 Cal.3d. at p. 944.
100. *McDoniel, supra*, 114 Cal.App.5th 949.
101. A claim for wrongful termination in violation of public policy is dubbed a *Tameny* claim after *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 177, which recognized a tort action where “an employer’s discharge of an employee contravenes the dictates of public policy.”
102. An employee can maintain a *Tameny* claim for retaliatory adverse action short of termination. See *Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal. App.3d 1556, 1562 (allowing a *Tameny* claim for retaliatory disciplinary action).
103. *McDoniel, supra*, 114 Cal.App.5th at pp. 972–963 (citing *Yau v. Allen* (2014) 229 Cal.App.4th 144, 154).
104. *Id.* at p. 963 (citing *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889–890).
105. *Id.* at pp. 963–964.
106. *McDoniel* did not involve or address the situation where an employee is terminated for refusing to take a polygraph. Its reasoning, however, would apply to that scenario. Additionally, the employee in *McDoniel* did not receive notice of his right to refuse the test, as required by section 432.2, subdivision (b). A different situation is presented where an employee receives the subdivision (b) advisement and still feels compelled to take the test.
107. Notably, although section 432.2 protects applicants, there is no tort action for failure to hire in violation of public policy. *Williams v. Sacramento River Cats Baseball Club, LLC* (2019) 40 Cal. App. 5th 280, 288. Thus, an applicant who is refused a job for refusing to take a compelled polygraph in violation of section 432.2 may not, under current caselaw, bring a *Tameny* action.
108. Civ. Code, § 1021. *Tameny* plaintiffs often seek attorney’s fees under Civil Code section 1021.5, the “Private Attorney General Fee Statute,” which gives courts discretion to award prevailing party fees in cases that vindicate important public rights. Civ. Code, § 1021.5. The *McDoniel* plaintiff sought and was denied section 1021.5 fees. *McDoniel, supra*, 114 Cal.App.5th at pp. 976–978.
109. Lab. Code, § 432.6, subd. (a). The Legislature passed A.B. 51 in 2019, which added section 432.6 to Labor Code effective January 1, 2020. Assem. Bill No. 51 (2019–2020 Reg. Sess.) § 3.
110. Lab. Code, § 432.6, subd. (d).

111. *McDoniel, supra*, 114 Cal.App.5th at p. 537 (citing *Lanigan v. City of Los Angeles* (2011) 199 Cal.App.4th 1020, 1030).
112. *Ibid.*
113. *Ibid.* (citing Sen. Com. on Judiciary, Analysis of Assem. Bill No. 51 (2019–2022 Reg. Sess.) July 9, 2019, p. 1.)
114. Lab. Code, § 432.6, subd. (a).
115. *Chamber of Commerce of the United States of America v. Bonta* (9th Cir. 2023) 62 F.4th 473, 490.
116. Lab. Code, § 432.6, subds. (a), (b).

# CALIFORNIA EVIDENCE UPDATE

Written by Eileen A. Scallen<sup>1</sup>



2025 was a quiet year for evidence law developments, with no changes to the California Evidence Code or to the Federal Rules of Evidence. However, California courts produced several significant cases worth reviewing.

## CALIFORNIA SUPREME COURT CASES

### RETROACTIVITY OF EVIDENCE CODE SECTION 352.2 (EVIDENCE OF CREATIVE EXPRESSION)

In 2025, the California Supreme Court continued to clarify the application of Evidence Code 352.2 (added to the Code in 2022). Under that statute, when evidence consisting of “creative expression” (including rap music lyrics and videos) is offered in a criminal case, the trial court must not only balance the factors in Evidence Code section 352, but also carefully and expressly balance the probative value of the creative expression against other dangers. These dangers include the possibility that the jury may treat the evidence as inadmissible character evidence or that the evidence will “explicitly or implicitly inject racial bias into the proceedings.”<sup>2</sup> The Courts of Appeal were split on whether section 352.2 applies retroactively, with *People v. Venable*<sup>3</sup> holding that the statute applies retroactively to cases not final at the time of its enactment, and *People v. Ramos*<sup>4</sup> and *People v. Slaton*<sup>5</sup> holding that the statute does not apply retroactively.

In *People v. Hin*,<sup>6</sup> the California Supreme Court did not reach the issue of whether Section 352.2 was “an ameliorative change in the law that applies retroactively to nonfinal convictions” because it concluded that the trial court’s decision to admit a CD containing the song “Bang Bang,” found in the defendant’s bedroom, at the guilt and penalty phases of the trial was an abuse of discretion under section 352 as it stood at the time of trial. The court emphasized the evidence lacked probative value:

[T]here was no foundation showing that the defendant was involved in the creation or production of the song or that it described any of the charged crimes. Indeed, there is no evidence that [the defendant] authored the song, wrote the lyrics, was involved in its production, or even that he listened to it.<sup>7</sup>

In addition to having minimal probative value, even on the issue of defendant's gang membership, the court emphasized the extensive dangers associated with admitting the evidence, finding it cumulative of other evidence of gang membership, as well as unfairly prejudicial because it invited inadmissible character evidence inferences and injected racial bias into the proceeding.<sup>8</sup> Thus, relying solely on section 352, the court found an abuse of discretion in admitting the evidence in the guilt and penalty phases of the trial. Nonetheless, the court concluded that the error was harmless given the other evidence against defendant.<sup>9</sup>

However, in *People v. Aguirre*<sup>10</sup> the Supreme Court definitively held that section 352.2 was not retroactive, expressly overruling *Venable*.<sup>11</sup> As in *Hin*, defendant was convicted of murder, attempted murder, and active participation in a criminal street gang. With gang-related enhancements, he was sentenced to death. The evidence offered in *Aguirre* differed substantially from the song offered in *Hin*. In *Aguirre*, the prosecution introduced the text of instant messages found on a computer used by defendant, along with handwritten lyrics that repeated some of the instant messages. Both the messages and the lyrics were sufficiently connected to defendant at trial. After a confusing tussle at the conclusion of trial over whether to redact the lyrics to focus only on the gang-related text, the trial court ultimately admitted the messages and all the lyrics, finding them relevant to the issues of motive and intent in connection with the charge of active participation in a criminal street gang and gang-related enhancements. On appeal, defendant challenged introduction of the lyrics over his section 352 objection but did not challenge introduction of the messages on that ground, relying solely on section 352.2 as a bar to both the messages and the lyrics.

A majority of the court held that section 352.2 does not apply retroactively, citing the standard rule that "statutes are presumed to operate only prospectively." In addition, they reasoned that section 352.2, as a rule of evidence, "does not implicate the contrary presumption of retroactive

application that adheres to certain kinds of ameliorative legislation that have a sufficiently close relationship to the reduction of punishment."<sup>12</sup> After carefully examining the text of section 352.2 and its legislative history, the majority stated, "we see nothing that 'clearly and unavoidably' reveals an intent to depart from the general rule of prospective-only application."<sup>13</sup>

The majority also rejected defendant's argument that a presumption of retroactivity, established by *In re Estrada*,<sup>14</sup> attached to section 352.2 because of its purportedly ameliorative character. In *Estrada*, the California Supreme Court recognized a presumption of retroactivity where legislation "amends a statute so as to lessen the punishment."<sup>15</sup> *Aguirre* reasoned that unlike statutes falling under *Estrada*, section 352.2 did not, and was not intended to "directly or potentially reduce the punishment for an offense. Nor does it change the elements of a substantive offense, defense, or penalty enhancement. Likewise, it does not create an alternative avenue for certain individuals to receive lesser or no punishment."<sup>16</sup>

The majority thus rejected a vigorous dissent by Justice Liu, joined by Justice Evans, which argued that the *Estrada* presumption of retroactivity applied because the effect of section 352.2 was to decriminalize creative expression by defendants.<sup>17</sup> The thrust of Justice Liu's argument was that the presumption of retroactivity should not be limited to statutes that expressly reduce punishment or alter the elements of crimes. Rather, the presumption should also apply where there is evidence of legislative intent to benefit criminal defendants through changes to statutory schemes that reduce the likelihood of wrongful conviction, which logically also reduces punishment.<sup>18</sup> He stated:

There is nothing magical about the form an ameliorative law takes: a change in how a trial is conducted may greatly benefit defendants, particularly where the Legislature has said the goal is to protect them from prejudice and bias. The evident purpose of a law like Evidence Code section

352.2 is to prevent what the Legislature regards as wrongful convictions.<sup>19</sup>

The majority responded that, as a rule of evidence, section 352.2 did not decriminalize anything and did not even exclude creative expression in all cases.<sup>20</sup> The majority reiterated its stance that the focal point of the *Estrada* presumption of retroactivity is a substantial connection to the reduction of punishment, which is missing in section 352.2.<sup>21</sup>

The *Aguirre* majority then considered the admissibility of the handwritten lyrics under section 352 and relevant constitutional principles but found no abuse of discretion by the trial court and no violation of defendant's constitutional rights.<sup>22</sup> In contrast to *Hin* and other cases in which the admission of rap lyrics was found to be an abuse of discretion,<sup>23</sup> the *Aguirre* majority found that the connection of the handwritten lyrics to the defendant and the overlap between the content of the lyrics and the facts of the crimes charged provided significant probative value on the defendant's participation in gang-related activities at the time of the shooting, as well as "issues of motive and intent, including defendant's premeditation and deliberation."<sup>24</sup> Although the majority acknowledged the potential dangers of emotional reactions to the graphic language used in the lyrics, along with the potential for jury misuse of the evidence as propensity evidence, it held that these dangers did not substantially outweigh the probative value of the lyrics.<sup>25</sup>

Interestingly, although the *Aguirre* majority did not apply the *Estrada* presumption of retroactivity to section 352.2, its ultimate disposition of the case rested on the *Estrada* presumption applied to Penal Code section 186.22, which was altered in various ways after trial, but particularly to require an enhanced showing to establish a pattern of criminal gang activity.<sup>26</sup> The parties agreed that the *Estrada* presumption applied to this issue, but they disagreed whether the failure to apply the proper standard was harmless error.<sup>27</sup> The majority ultimately concluded that the absence of findings made under the revised legal standard for proving a

pattern of criminal gang activity was not harmless. Thus, defendant's conviction of active participation in a criminal street gang, and the true findings on the gang enhancements, and the gang-murder special-circumstances allegation had to be reversed. Because the gang-murder special circumstance was the only special circumstance allegation, the death sentence also had to be reversed.<sup>28</sup>

## EVIDENCE OF CRIMINAL DEFENDANT'S CHARACTER USED TO REBUT EVIDENCE OF VICTIM'S CHARACTER UNDER EVIDENCE CODE SECTION 1103, SUBDIVISION (B)

*People v. Barrett*<sup>29</sup> provides a lesson in the careful use of victim evidence in criminal cases. Joseph Barrett was convicted of first-degree murder, aggravated assault by a life prisoner, and a weapons offense arising from the stabbing death of his cellmate, Thomas Richmond, and was sentenced to death.<sup>30</sup> The prosecution's theorized defendant killed his cellmate because he viewed Richmond as a "rat." Defendant argued that he killed Richmond in self-defense after Richmond received an unwrapped knife and several messages or "kites" that he did not allow Barrett to read, which suggested to Barrett that Richmond planned to kill him. Defendant argued, among other errors, that the trial court erred by allowing the prosecution to present uncharged misconduct by defendant to rebut his testimony about the victim.

In *Barrett*, the defense tried to walk a fine line between subsections of Evidence Code section 1103. Before putting on its case, the defense indicated that it planned to present evidence of the crimes Richmond committed that resulted in his imprisonment, as well as evidence of defendant's knowledge of Richmond's prior in-prison bad acts to counter the prosecution's theory that defendant viewed his cellmate with suspicion as a rat. The defense posited that Barrett viewed Richmond with respect, not suspicion, because Richmond had engaged in prison misconduct himself and the defendant had no reason to kill him. The prosecutor warned that if the defense attacked Richmond's character, then the prosecutor would attack the

defendant's character under section 1103. Defense counsel emphasized, "we're not introducing the evidence to show he's a bad character in the sense that he acted in conformity with his bad character. We're just showing that in the prison environment that he was a respected person . . ." The trial court reserved ruling on the issue to see how the evidence was presented.

During his opening statement, defense counsel started to cross the line by stating that Richmond had been caught with weapons, and had "gassed" (thrown dangerous or foul liquid at) a prison guard, but then insisted, "I'm not saying it's anything to imply that that's unusual but that—or to imply that he's a villain, but only to put in balance that he's not an innocent either."<sup>31</sup> Although the defense tried to deny that this was a reference to the victim's character, the defense confused the purposes for which the evidence was to be offered—was it to show that the victim had a violent character or that the victim was known as a "bad actor" (and thus trusted by other inmates)—or both? The defense then presented testimony from a prison official about the crimes for which the victim was committed: three convictions for second-degree robbery and one conviction for burglary, and elicited a concession that the second-degree robbery convictions required a showing of the taking being "threat-related." When defendant took the stand, he testified Richmond told him he was assigned to the heightened security section as defendant's cellmate because an officer had found knives in his pants during a cell search. Barrett also testified that he and Richmond had discussed taking weapons into the prison yard, and that, when they were separated after flooding a cell, Richmond had told defendant he had again been found with weapons.

During Barrett's cross-examination, the prosecution was allowed to elicit, over defense objections, evidence of several violent acts (spanning from 1995 to 2003) committed by defendant, including multiple assaults upon other inmates and various weapon possession incidents. The trial court eventually cut off the prosecution's questions as "cumulative." The prosecution did not offer evidence

of defendant's prior murder conviction because the trial court indicated it would violate Evidence Code section 352.

The parties and the trial court engaged in a round of briefing and several discussions on whether the prosecution's rebuttal evidence was proper and how to instruct the jury. The trial court expressed that it struggled over whether the prosecution's rebuttal evidence was proper and how to instruct the jury.<sup>32</sup> The upshot, however, was that although the defense tried to characterize the evidence of the victim's misconduct as showing a basis for his fellow inmates (including defendant) to trust him, the evidence also revealed the victim's propensity for violence. The trial court ultimately concluded defendant opened the door to the admission of evidence of his own violent character because he did not clearly limit references to the victim's possession of weapons, which led to inferences about the victim's violent character. It would have been a closer question if defendant had limited his testimony to the victim's less volatile misconduct violations, such as flooding a cell.

The *Barrett* court emphasized that "the operation of Evidence Code section 1103[, subdivision ](b) is dependent upon a choice made by a defendant, in much the same way that other strategic choices made by the defense during a trial will make admissible evidence that otherwise would have been excluded."<sup>33</sup> Defense counsel must make careful calculations, especially since section 1103 permits evidence of specific acts of violence on the part of the defendant and victim, which the Federal Rules of Evidence prohibit—limiting the evidence to reputation or opinion testimony.<sup>34</sup> The vividness of specific act evidence that suggests any kind of violence on the part of a victim is so powerful that it nearly invites a ruling that the defendant has opened the door to evidence of his own violent character.

## CONFRONTATION CLAUSE/*SANCHEZ*

In *People v. Cardenas*,<sup>35</sup> the California Supreme Court applied its confrontation clause analysis from *People v. Sanchez*.<sup>36</sup> *Cardenas* arose as an

automatic appeal of the death penalty, imposed after defendant was convicted of first degree murder and attempted murder, and the jury found gang-related special circumstance and sentence enhancement allegations to be true. The court held that the prosecution expert witness violated *Sanchez* in two respects. First, the prosecution gang expert testified to case-specific out-of-court statements (conversations with investigators and police reports), which were not covered by a hearsay exception or independently admissible.<sup>37</sup> *Sanchez* held that this type of evidence is inadmissible under California law.<sup>38</sup> Second, the case-specific statements relayed by the prosecution expert in this criminal case were “testimonial,” created for the purpose of prosecuting the defendant. *Sanchez* held that, under federal constitutional law, such evidence violates the confrontation clause where (1) there is no showing that the hearsay declarant is unavailable; and (2) there has been no prior opportunity to cross-examine the declarant.<sup>39</sup> Here, the expert’s testimony about the predicate acts of gang-motivated activity for the gang enhancements was based on conversations with other law enforcement personnel as part of defendant’s prosecution, and was thus clearly testimonial. Without the showing of unavailability and prior opportunity for cross-examination, admission of this evidence violated the confrontation clause. Because the error was not harmless, the ruling required reversal.<sup>40</sup>

In *People v. Jasso*,<sup>41</sup> the Supreme Court found no confrontation clause violation where the prosecutor posed leading questions to a witness who refused to answer them. Although California courts have held that a defendant’s confrontation clause right is violated if a prosecutor facing a witness who refuses to answer essentially testifies for the witness by asking leading questions that convey the witness’s prior statements to the police incriminating defendant, the facts in this case were distinguishable because the prosecutor only asked the witness (defendant’s accomplice) leading questions about his personal knowledge of matters involving defendant.<sup>42</sup> The court also analyzed whether a different accomplice’s testimony satisfied the hearsay exception for a statement against

interest (under Evidence Code section 1230) and concluded that the statements were sufficiently against interest and reliable, and did not violate the confrontation clause, because they were made to a friend with no expectation they would be used for prosecution and were therefore not testimonial.<sup>43</sup>

In *People v. Alvarez*,<sup>44</sup> the Supreme Court rejected a defendant’s confrontation clause claim where a four-year-old child made inculpatory statements about his father’s physical abuse to his mother, the mother’s boyfriend, and the boyfriend’s family. The trial court admitted the child’s statements under Evidence Code section 1360’s exception to the hearsay rule in criminal prosecutions for a child’s statements describing acts of child abuse or neglect. The court found that the trial court did not abuse its discretion by concluding that the child’s out-of-court statements had sufficient indicia of reliability.<sup>45</sup> The court also upheld the trial court’s finding that the statements were not testimonial; rather, the statements were “casual remarks to acquaintances and not formal accusations made to government agents.”<sup>46</sup> Defendant also argued exclusion was appropriate under section 352, pointing to the trial court’s alleged failure to balance the probative value of the statements against their prejudicial effect. The court observed that “the better practice” is for the trial court to make an express record of its balancing under section 352, but found no error given the proper findings of reliability under section 1360.<sup>47</sup>

## CALIFORNIA COURT OF APPEAL CASES<sup>48</sup>

### HEARSAY IN DVPA PROCEEDINGS AND FAMILY LAW

In *In re Marriage of M.P. & M.C.*,<sup>49</sup> a proceeding brought under the Domestic Violence Prevention Act (DVPA), the Court of Appeal upheld a trial court’s restraining order resting on statements made by a child to her mother that her father had sexually abused her. The trial court erred in considering these statements for the nonhearsay purpose of showing their effect on the mother’s state of mind because the mother’s state of mind was not relevant and the statements were required for their truth.

The statements were also inadmissible under Evidence Code section 1250, which provides a hearsay exception for statements of “the declarant’s then existing state of mind, emotion, or physical sensation,” because the statements were used to prove the husband’s conduct rather than the child’s conduct. But the child’s statements were admissible under the child dependency hearsay exceptions created by the Court of Appeal in *In re Carmen O.*<sup>50</sup> and approved by the California Supreme Court in *In re Cindy L.*<sup>51</sup> The Court of Appeal here held that the child dependency hearsay exceptions should also apply in DVPA proceedings, rejecting arguments that such exceptions should be limited to child dependency proceedings and that DVPA proceedings require strict adherence to traditional evidentiary rules.

In *Adoption of X.D.*,<sup>52</sup> the Court of Appeal held that the trial court abused its discretion by excluding screenshots of text messages in which the biological father threatened to kill the mother and unborn child. The court held that text messages from the biological father to his sister and later shown to biological mother were sufficiently authenticated under Evidence Code section 1421. The messages were admissible both for non-hearsay purposes (as circumstantial evidence of the mother’s mental state and her reasonable fear of the father) and under hearsay exceptions for party opponent statements (section 1220) and present state of mind (section 1250). The court also rejected respondent’s argument that the evidence should be excluded under Evidence Code section 352. The exhibit was probative of the lack of support and threats made by the father, and although damaging to the father’s case, that does not constitute “undue prejudice” under section 352.

## EXPERT TESTIMONY

Health & Safety Code section 1799.110 requires that in malpractice actions against “physicians who remotely provide medical expertise on an expedited basis as part of an emergency department in the midst of treating an emergency department patient,” expert witnesses on the standard of

care for emergency medical treatment must have “substantial professional experience within the last 5 years while assigned to provide emergency medical coverage.” In *Charlie L. v. Kangavari*,<sup>53</sup> the Court of Appeal held that the statute’s heightened qualifications for expert testimony on the standard of care applied when the physician being sued was an on-call radiologist who remotely reviewed x-ray and ultrasound images for an emergency department patient on a “stat” basis, as requested by the emergency department. But the trial court erred in finding that the defense expert met the heightened standard and the plaintiff’s expert did not. The Court of Appeal concluded that both experts failed to meet the heightened qualification standard, requiring reversal of summary judgment for the defendant. Applying a de novo standard of review because the qualifications of the experts were not disputed, the appeals court concluded that the defendant’s expert failed to meet the statutory standard because although he had extensive radiology experience in a hospital setting, he did not specify in his declaration or in his curriculum vitae his “professional experience working under emergency conditions, identify the unique challenges facing a radiologist serving the emergency department, or key his opinion to the standard of care applicable under emergency circumstances specifically.”<sup>54</sup> The supplemental declaration and curriculum vitae of the plaintiff’s expert were also defective “because they did not specify that his work in emergency departments reading diagnostic studies or reviewing images indicate that he undertook these tasks while working under emergency conditions.”<sup>55</sup>

In *Birdsall v. Helfet*,<sup>56</sup> the Court of Appeal held that the trial court abused its discretion by excluding evidence about whether the plaintiff was wearing a seatbelt because such evidence was relevant to comparative fault defenses. The court also held that the jury could rely on seat belt evidence without requiring expert testimony: “here in the 2024 trial, where Northern California jurors have since 1992—for most jurors, their entire adult life—lived with a Vehicle Code section mandating seat belt use, not to mention the constant admonitions, reminders, slogans, and signs telling of the significance of seat

belts. That experience, that common sense was improperly disregarded here.”<sup>57</sup>

In *Richard v. Union Pacific Railroad Co.*,<sup>58</sup> the Court of Appeal held that the trial court abused its discretion by excluding plaintiff’s expert on the ground that he “has no training or experience.”<sup>59</sup> The appellate court emphasized that expertise is “relative to the subject,” may be based on experience, and is “not subject to rigid classification according to formal education or certification.”<sup>60</sup> The expert’s 42 years of experience as an engineer, many of which were on the kind of train involved in the subject accident and on the same track where the accident occurred, were sufficient to qualify him to give a helpful opinion on the engineer’s handling of the train.<sup>61</sup> The court rejected the defendant’s argument that the expert was not qualified because he could not testify about some of the data that the defendant had relied upon. The court explained that the expert’s “lack of expertise to testify about *some* topics does not mean he is not competent to testify about *other* topics.”<sup>62</sup>

## EVIDENTIARY PRIVILEGES

In *Johnson v. Department of Transportation*,<sup>63</sup> the trial court properly granted the defendant’s motion to disqualify the plaintiff’s attorney and three of his retained experts due to the attorney’s violation of a protective order in an employment case. The protective order concerned an email about the case sent by a defense attorney to the plaintiff’s supervisor, who shared the email with the plaintiff and his attorney and retained experts. Upholding the trial court’s disqualification order, the appellate court provided a cogent explication of the legal and ethical provisions that control the application of the attorney-client privilege in the corporate setting, the conditions under which it is waived, and the standards for disqualification.

In *Schneider v. Superior Court*,<sup>64</sup> a criminal defendant who was charged with murder filed a discovery motion under *Pitchess v. Superior Court*<sup>65</sup> and *Brady v. Maryland*,<sup>66</sup> seeking discovery of *Brady* information contained in the confidential personnel records of six deputies with the Los Angeles County

Sheriff’s Department (LASD). “Under *Brady* . . . , the prosecution must disclose to the defense any evidence that is ‘favorable to the accused’ and is ‘material’ on the issue of either guilt or punishment.”<sup>67</sup> Because *Brady* material may exist in confidential police personnel files, the only way to request such material is by using the procedures set forth in Evidence Code sections 1043–1045, which codified *Pitchess*. A motion seeking such information is called a *Brady/Johnson* motion.<sup>68</sup>

The trial court found that the defendant established good cause for an *in camera* review of the records, and after conducting that review, determined the personnel files of four of the six deputies contained *Brady* material. But the trial court denied the defendant’s request for disclosure of the *Brady* material itself, and instead ordered disclosure of the names, addresses, and telephone numbers of the individuals who had witnessed or complained of the conduct at issue. The trial court concluded that this limited disclosure was mandated under *Pitchess* procedures. As a matter of first impression, the Court of Appeal reversed, holding that the different standard of information “favorable” and “material” to the defense under *Brady* required full disclosure of the materials, including documents and any audio-video materials.<sup>69</sup>

*T.M. v. Superior Court*<sup>70</sup> held that when the attorney for a juvenile expresses doubt as to his client’s competency, triggering a competency proceeding, the attorney has “tendered” the issue of competency in the client’s interest such that the patient-litigant exception of Evidence Code section 1016 applies, and all previously privileged documents may be considered during the competency evaluation.<sup>71</sup>

## EVIDENCE IN PENAL CODE SECTION 1172.6 RESENTENCING PROCEEDINGS.

In *People v. Ramos*,<sup>72</sup> the Court of Appeal held that where a petitioner’s codefendant is tried separately from the petitioner, the prosecution may use the transcript from that codefendant’s separate trial, without a showing that the codefendant was unavailable or that the petitioner had a prior

opportunity to cross-examine the codefendant under Penal Code section 1172.6, subdivision (d)(3) in the section 1172.6, subdivision (d) resentencing hearing.<sup>73</sup>

*People v. Nuno*<sup>74</sup> decided as a matter of first impression that a petitioner may obtain disclosure of peace officer personnel information under *Brady* principles through *Pitchess* procedures in advance of a section 1172.6 evidentiary hearing.<sup>75</sup>

## ENDNOTES

1. Eileen A. Scallen is Professor of Practice at UCLA School of Law and the co-author of *California Evidence Courtroom Manual* (2025) (published annually by LexisNexis). This text is a thoughtfully annotated copy of the California Evidence Code, with more detailed explanation of Evidence code provisions, analytical frameworks for evidence law issue spotting, and current legislative and case law developments.
2. Evid. Code, § 352.2, subd. (a).
3. (2023) 88 Cal.App.5th 445, review granted May 17, 2023, S279081 (*Venable*).
4. (2023) 90 Cal.App.5th 578, review granted July 12, 2023, S280073.
5. (2023) 95 Cal.App.5th 363, review granted Nov. 15, 2023, S282047.
6. (2025) 17 Cal.5th 401, as modified on denial of reh'g, (Apr. 23, 2025) and cert. denied, 2025 WL 2824316 (U.S. 2025) (*Hin*).
7. *Id.* at p. 479.
8. *Id.* at pp. 479–482.
9. *Id.* at p. 482.
10. (2025) 18 Cal.5th 629 (*Aguirre*).
11. *Id.* at p. 683.
12. *Id.* at p. 683.
13. *Id.* at p. 690, (quoting *People v. Burgos* (2024) 16 Cal.5th 1, 19).
14. (1965) 63 Cal.2d 740 (*Estrada*).
15. *Id.* at p. 745.
16. *Aguirre, supra*, 18 Cal.5th at p. 691, quoting *Burgos, supra*, 16 Cal.5th at p. 21.
17. *Id.* at p. 727 (dis. opn. of Liu, J.).
18. *Id.* at pp. 727–728.
19. *Id.* at p. 728.
20. *Id.* at p. 692.
21. *Id.* at pp. 692–693.
22. *Id.* at pp. 694–695.
23. *Id.* at pp. 698–699.
24. *Id.* at pp. 695–696.
25. *Id.* at pp. 697–698.
26. *Id.* at p. 711.
27. *Id.* at pp. 714–716.
28. *Id.* at 718.
29. (2025) 17 Cal.5th 897.
30. *Ibid.*
31. *Id.* at p. 949.
32. *Id.* at p. 952 (quoting trial judge on his decision to allow evidence of defendant's prior acts of violence: “this is a tough call, and I don't like to do it. The evidence wasn't limited when it went in. It would be too late to do it now.”).
33. *Id.* at p. 956 (quoting *People v. Fuiava* (2012) 53 Cal.4th 622, 698).
34. Fed. Rules Evid., rule 405(a).
35. (2025) 18 Cal.5th 797.
36. (2016) 63 Cal.4th 665.
37. *Cardenas, supra*, 18 Cal.5th at pp. 817–818.
38. *Sanchez, supra*, 63 Cal.4th at p. 686.
39. *Ibid.*
40. *Cardenas, supra*, 18 Cal.5th at p. 818. The court also found reversible error due to the statutory changes in defining predicate acts of gang-motivated activity. *Ibid.*
41. (2025) 17 Cal.5th 646.
42. *Id.* at pp. 682–684.
43. *Id.* at pp. 668–673.
44. (2025) 18 Cal.5th 387.
45. *Id.* at pp. 463–464.
46. *Id.* at p. 463.
47. *Id.* at p. 464.
48. This essay focuses on published cases as of the end of 2025, but counsel is advised to check the status of these cases carefully as the Supreme Court may subsequently order cases depublished.
49. (2025) 116 Cal.App.5th 1096.
50. (1994) 28 Cal.App.4th 908.
51. (1997) 17 Cal.4th 15.
52. (2025) 114 Cal.App.5th 812.

53. (2025) 107 Cal.App.5th 1117.
54. *Id.* at p. 1132.
55. *Id.* at p. 1133.
56. (2025) 113 Cal.App.5th 558.
57. *Id.* at p. 585.
58. (2024) 105 Cal.App.5th 1263.
59. *Id.* at p. 1271.
60. *Id.* at p. 1277.
61. *Id.* at p. 1280.
62. *Id.* at p. 494, emphasis in original.
63. (2025) 109 Cal.App.5th 917.
64. (2025) 111 Cal.App.5th 613.
65. (1974) 11 Cal.3d 531.
66. (1963) 373 U.S. 83.
67. *Schneider, supra*, 111 Cal.App.5th at p. 624.
68. *Id.* at p. 622, citing *Johnson v. Superior Court* (2015) 61 Cal.4th 696.
69. *Schneider, supra*, 111 Cal.App.5th at p. 632.
70. (2024) 104 Cal.App.5th 664.
71. *Id.* at p. 682.
72. (2025) 112 Cal.App.5th 174, 337 Cal.Rptr.3d 401.
73. *Id.*, 337 Cal.Rptr.3d at p. 412.
74. (2024) 105 Cal.App.5th 1030.
75. *Id.* at pp. 1061-1062.

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# INSURANCE LAW

## INTRODUCTION

For the first time in many years, the California Supreme Court did not render an insurance coverage decision in 2025, and the year was notable for somewhat less jurisprudence than usual. Moreover, notwithstanding California's reputation as being friendly to policyholders, the year was marked by multiple decisions favoring insurers. This included cases barring coverage for damages arising from molestation, "compensated carrying," and "going and coming" to work. However, there were also several decisions favoring policyholders, including important cases finding coverage for smoke damage from wildfires, as well as a title insurance decision which strongly reaffirmed the breadth of the duty to defend.

## FIRST PARTY POLICIES

### THREE DIFFERENT COURTS OFFER THREE DIFFERENT TAKES ON COVERAGE FOR SMOKE DAMAGE

The year started with the horrific Pacific Palisades and Eaton wildfires, teeing up numerous insurance coverage issues, not the least of which was coverage for homes that suffered smoke damage even though they did not burn. Not long after those fires, three different courts weighed in on the issue in cases stemming from earlier wildfires. The reasoning of all three decisions flowed from 2024's seminal California Supreme Court case, *Another Planet Entertainment, LLC v. Vigilant Insurance Company*,<sup>1</sup> which clarified that the actual or potential presence of COVID-19 on an insured's premises does not generally constitute direct physical loss or damage to property within the meaning of a property insurance policy.

The only appellate case among the three, *Gharibian v. Wawanesa General Insurance Company*,<sup>2</sup> sent shivers down the spines of policyholders. However, as the subsequent cases made clear, there was less than meets the eye to *Gharibian*, which involved an unusual factual scenario. The nearby wildfire in *Gharibian* resulted in debris entering the home, but there was no burn damage or other physical damage to anything at the property. Wawanesa's consultant concluded that the property could simply be cleaned, and Wawanesa paid for those services, although plaintiffs never had the work done. Meanwhile, plaintiffs' own consultant conceded that the mere presence of soot, absent exposure to water, does not physically damage a structure. Plaintiff even testified that the smell of smoke dissipated within three months.<sup>3</sup>

Plaintiffs' homeowner policy with Wawanesa insured against "direct physical loss to property." Plaintiffs sued when Wawanesa refused to pay for painting, replacement of insulation, and other work. The trial court granted summary judgment for Wawanesa, finding that plaintiffs had not created a disputed issue of fact as to whether they suffered any physical loss.<sup>4</sup> The Court of Appeal affirmed.

Quoting *Another Planet*, the Court of Appeal noted: "Under California law, direct physical loss or damage to property requires a distinct, demonstrable, physical alteration to property. The physical alteration need not be visible to the naked eye, nor must it be structural, but it must result in some injury to or impairment of the property as property."<sup>5</sup> Since there was no evidence that the wildfire debris "alter[ed] the property itself in a lasting and persistent manner," but rather the debris was "easily cleaned or removed from the property," plaintiff could not demonstrate "direct physical loss to property."<sup>6</sup>

Better facts for the policyholder led to a different result in a federal district court decision delivered at almost the same time as *Gharibian*. The plaintiff in *Bottega, LLC v. National Surety Corporation-Chicago, IL*, owned a restaurant which closed for several days in October 2017 due to the North Bay Fires, having been "inundated with smoke soot, ash, and char."<sup>7</sup> National Surety denied plaintiff's claim for lost business income, which required that plaintiff establish "(1) a suspension of operations (2) caused by (3) direct physical loss of or damage to the property, (4) resulting from a Covered Cause of Loss."<sup>8</sup>

On summary judgment, the district court found that there had been direct physical loss or damage so as to trigger lost business income coverage. In doing so, the court quoted *Inns-by-the-Sea v. California Mutual Insurance Company*<sup>9</sup>—the original California COVID-19 coverage case cited with approval in *Another Planet*—for the proposition that "contamination of a structure that seriously impairs or destroys its function may qualify as direct physical loss."<sup>10</sup>

The district court found that COVID-19 cases were factually inapposite because those courts distinguished COVID-19—a virus that can be disinfected—from noxious substances and fumes that physically alter property. Instead, the *Bottega* court found, "Whereas a virus is more like dust and debris that can be removed through cleaning, . . . smoke is more like asbestos and gases that physically alter the property."<sup>11</sup>

Perhaps the most thorough and thoughtful consideration of the nature of smoke damage came a few months later, in *Aliff v. California Fair Plan Association*.<sup>12</sup> Though only a Los Angeles County Superior Court decision, it received significant attention both for its analysis of how smoke damage can constitute direct physical loss to property, and the improper limitations put on coverage for such damage in the standard California FAIR Plan Association<sup>13</sup> policy.

Aliff alleged that the CFP Fair Plan improperly issued property insurance policies whose fire coverage is unlawfully restrictive with respect to claims for smoke damage in violation of Insurance Code section 2071. Section 2071 specifies a standard form of fire insurance. While policies need not comply with the standard form verbatim, they must provide substantially equivalent or more favorable coverage.

The CFP policy covers "direct physical loss," defined as "any actual loss or physical damage, evidenced by *permanent physical changes*," including smoke damage, which in turn is defined as:

sudden and accidental direct physical loss from smoke (including airborne, windborne, or wind-driven combustion by-products or particulates such as carbon/soot/ash/char/debris) that is visible to the unaided human eye, or odor from smoke or ash that is detected by the unaided human nose of an average person, and not by the subjective senses of you or by laboratory testing.<sup>14</sup>

In contrast, section 2071 simply requires coverage for all "LOSS BY FIRE."

Ruling on Aliff’s motion for summary adjudication for declaratory relief, the superior court first noted that, in a memorandum sent by the CFP to insurance brokers concerning this language, the CFP acknowledged that the requirement of “permanent physical changes to covered property” would result in a reduction in coverage.<sup>15</sup> Next, the superior court found that the CFP’s limited definition of “direct physical loss” violated *Another Planet*.

The Supreme Court found in *Another Planet* that “a change or alteration need not be visible to the naked eye to constitute direct physical damage to property.” “While saturation, ingraining, or infiltration of a substance into the materials of a building or persistent pollution of a premises requiring active remediation efforts is sufficient to constitute ‘direct physical loss of or damage to property,’ evanescent presence is not.”<sup>16</sup> Thus, the CFP’s requirement that smoke damage cause “permanent physical changes” ran afoul of *Another Planet* and section 2071. So too the requirement that smoke damage “be visible to the unaided human eye” or “detected by the human nose of an average person.”<sup>17</sup>

Interestingly, the superior court distinguished *Gharibian*, noting that there was no evidence of physical damage presented in that case. In contrast, Aliff’s evidence demonstrated that the fire caused pitting to two windows, as well as the destruction of landscaping on the property.<sup>18</sup> Regardless, any such factual dispute had no bearing on whether the CFP’s policy language accorded with section 2071—it did not. However, while Aliff prevailed on his declaratory relief claim, his Business and Professions Code section 17200 claim could not be resolved on summary judgment, so it remains to be seen whether the CFP will appeal. In the meantime, while *Aliff* cannot technically be cited as authority, its reasoning is based on *Another Planet* and other controlling case law, and should therefore be considered by anyone litigating these issues.

## INSURER NOT LIABLE WHERE ITS AGENT PLACED SEPARATE POLICY FOR FIRE INSURANCE WITH THE CFP

In late 2024, the Second District Court of Appeal decided a different type of case with important implications for wildfire victims, *Hughes v. Farmers Insurance Exchange*.<sup>19</sup> Hughes sued Farmers where its agent, Hartnett, had placed insufficient fire coverage under the CFP along with coverage for other types losses with Farmers. The Farmers policy contained a “Fair Plan Companion Endorsement,” which specifically excluded coverage for any losses that could be covered under the CFP. Hughes’s Malibu home suffered a fire loss of almost \$3 million, but was insured for only \$1.2 million under the CFP.<sup>20</sup>

Hughes sued Hartnett for negligence and breach of fiduciary duty, along with Farmers for negligence based on an alleged failure to properly train and supervise Hartnett, as well as vicarious liability for Hartnett’s actions as its agent. Farmers moved for summary judgment, asserting that Hartnett was not acting as its agent for purposes of obtaining the Fair Plan policy.<sup>21</sup> The trial court agreed.<sup>22</sup>

Affirming, the Court of Appeal noted the difference between an insurance agent under Insurance Code section 31 and an insurance broker under Insurance Code section 33. “As the two terms are defined in the Insurance Code, it is generally true an insurance agent acts on behalf of an insurer and an insurance broker acts on behalf of an insured.”<sup>23</sup> No disputed issue of fact was raised as to the issue of actual agency, since Hartnett’s appointment with Farmers did not include the sale of CFP policies. Moreover, the CFP policy itself described Hartnett as Hughes’s insurance broker.<sup>24</sup> Nor was there any evidence that Farmers did anything to contribute to a reasonable belief by Hughes that Hartnett was acting as its agent in procuring the CFP policy for purposes of ostensible agency.<sup>25</sup> Accordingly, the trial court properly granted summary judgment to Farmers.

## CANNABIS DELIVERY DRIVER DENIED COVERAGE UNDER AUTO POLICY'S COMPENSATED CARRYING EXCLUSION

Andrew Murphy worked full-time as a delivery driver for Grassdoor, a licensed cannabis retailer and delivery service, using his personal vehicle. He got into an accident delivering for Grassdoor, and made a claim on his auto policy with Interinsurance Exchange of the Automobile Club, which denied the claim based on the “compensated carrying exclusion,” which provided the policy did not apply to “any *automobile* . . . while used to carry *persons* or property . . . in each instance for: (1) a charge; (2) any form of compensation, voluntary payment or benefit; or (3) the promise or agreement for any form of compensation, voluntary payment or benefit, whether or not such compensation, voluntary payment or benefit is actually paid or provided.”<sup>26</sup> Murphy sued the Exchange, challenging the compensated carrying exclusion as ambiguous and against public policy. The Exchange moved for summary judgment, and the trial court granted the motion. The Court of Appeal affirmed.

On appeal, Murphy represented himself and repeated the arguments the trial court rejected. The Court of Appeal found the exclusion was not ambiguous, because it was “conspicuous, plain and clear.”<sup>27</sup> The exclusion “adequately alerts the reader to read the entire endorsement to understand how it changes the policy [and makes it] . . . clear that everything under the heading was excluded. The language of the exclusion is sufficiently understandable and conveys that the policy would not cover damage arising from use of the vehicle to transport people or property for a charge or for compensation.”<sup>28</sup>

The appellate court also found no violation of public policy. It noted that under the Labor Code, “Murphy’s employer, Grassdoor, was legally responsible for making him whole in this situation.”<sup>29</sup> Though Grassdoor was insolvent, the insurance company’s “obligation to provide personal vehicle coverage is not triggered by the financial condition of an insured’s employer. Murphy has a remedy

against Grassdoor. He cannot seek that remedy from a third party who has explicitly disclaimed liability for it.”<sup>30</sup> Since the “exclusion does not contravene the statute,” the Court of Appeal could “see no public policy basis on which to invalidate the exclusion.”<sup>31</sup>

## THIRD DISTRICT COURT OF APPEAL ANNULS DECISION OF WORKERS COMPENSATION APPEALS BOARD, REJECTS SPECIAL RISK AND DUAL PURPOSE EXCEPTIONS TO GOING AND COMING RULES ON EMPLOYEE’S CLAIM FOR SERIOUS INJURIES SUSTAINED DURING VANPOOL COMMUTE

Workers compensation insurance benefits are available for an injury that the employee proves by a preponderance of the evidence is one “arising out of and in the course of the employment,” but the going and coming rule bars compensation for “an injury suffered during a local commute enroute to a fixed place of business at fixed hours in the absence of special or extraordinary circumstances,” because “ordinarily the employment relationship is suspended from the time the employee leaves his work to go home until he resumes his work.”<sup>32</sup>

Javier Hernandez worked as a laborer for Ceja Reyes, a contractor for agricultural workers. Hernandez was assigned to a work site in Winters, CA, about 60 miles from his home in Yuba City. The employer did not provide transportation, leaving Hernandez responsible for getting to and from work in a vanpool operated as a side business by another employee. Hernandez was riding home in the van when it crashed, and he suffered catastrophic injuries, including amputation of his right leg. He filed a workers compensation claim, which the employer’s carrier, Zenith, denied based on the going and coming rule.

Hernandez filed a claim with the Workers’ Compensation Appeals Board, which ruled in his favor, “conclud[ing] Hernandez’s claims came within the special risk and dual purpose exceptions to the going and coming rule.”<sup>33</sup>

“[T]he special risk exception to the going and coming rule provides for compensation where a

risk associated with the employment causes injury *just outside the employer's premises,*" and "(1) if but for the employment the employee would not have been at the location where the injury occurred and (2) if the risk is distinctive in nature or quantitatively greater than risks common to the public."<sup>34</sup> It applies "chiefly in borderline cases where the employee is injured in close proximity to the employer's premises just before or after the workday," to "extraordinary transits that vary from the norm because the employer requires a special, different transit, means of transit, or use of a car, for some particular reason of his own . . . [,] bestowing a special benefit on the employer by reason of the extraordinary circumstances."<sup>35</sup>

The Third District Court of Appeal rejected the Board's conclusion that the special risk exception applied, because the "exception only applies to situations just outside the employment premises and the facts of this case do not comport with that requirement."<sup>36</sup> The opinion reports that the accident happened in Yolo County, which includes Winters, while the employee's home in Yuba City is over the Sutter County line, roughly 50 miles from the job site.

Even though the Labor Code requires, and our Supreme Court has held, that workers' compensation "shall be liberally construed to protect the injured [and] any doubts as to the rule's application are to be resolved in favor of coverage," the Court of Appeal said it had "no doubts" that an unidentified point in that 50 mile distance was too far to approve a Board decision awarding benefits to a farm laborer who lost his leg riding in a van returning home from work.<sup>37</sup>

The court also considered an alternative formulation of the special risk doctrine applicable in tort law, that imposes the cost of injury on the employer "[w]here the risk of injury is created by the enterprise, within the scope of the employee's employment, and it proximately causes the injury."<sup>38</sup> But it concluded that theory did not support an award to Hernandez either, because "there was no relationship between the risk and the location of the

premises or conditions over which the Board found the employer had control."<sup>39</sup>

The Court of Appeal also rejected the Board's application of the dual purpose exception, which "applies to a local commute to and from the place of employment *when the employee performs work at home.* [Citations.] The basic question to be answered in a particular case is whether the trip involves an incidental benefit to the employer, not common to commute trips by ordinary members of the work force."<sup>40</sup>

The Board found there was a dual purpose to the ride home because it facilitated the employer's business of "reliably providing agricultural laborers . . . and the arrival of the employees at the same time allowed [the manager] to assign them their work duties all at once." But the Court of Appeal found those facts insufficient for the dual purpose exception, because the manager's assigning each worker his duties when the van arrived did not establish that the workers "performed work on the van or at home."<sup>41</sup>

## **NINTH CIRCUIT ADOPTS CAUSATION REQUIREMENT FOR BREACH OF CONTRACT CLAIMS BASED ON NONCOMPLIANCE WITH CALIFORNIA LIFE INSURANCE NOTICE STATUTES**

In *Small v. Allianz Life Insurance Company of North America*,<sup>42</sup> the first of a trio of cases, the Ninth Circuit found that the California Supreme Court would require a showing of causation to prevail on a breach of contract claim against a life insurance company where it failed to comply with California's notice provisions. Those provisions were enacted by the California Legislature in 2012. Insurance Code section 10113.71 requires a grace period of 60 days from the premium due date and that a notice of pending lapse be provided at least 30 days prior to the effective date of termination if due to nonpayment of premium; section 10113.72 requires that the insured be given a right to designate an additional person to receive notice of lapse or termination.

Small was a beneficiary under her deceased husband's life insurance policy, which was terminated when they missed a payment after 26 years. Small's husband thereafter died, and Allianz denied the death benefit claim. However, Allianz had never provided notice of the right to designate a third party to receive notice of unpaid premiums or impending termination. Small thus filed a class action complaint alleging breach of contract on behalf of owners and beneficiaries of life insurance policies which were terminated for nonpayment of premiums without receiving an opportunity to designate a third person to receive notice.<sup>43</sup>

The district court certified two subclasses: (1) living insureds seeking to have their policies reinstated, and (2) beneficiaries of policies with deceased insureds.<sup>44</sup> Allianz appealed the class certification, and the Ninth Circuit reversed.

In order to determine whether the class could be certified, the district court first needed to determine what the plaintiff must show in order to recover under the relevant cause of action—breach of contract.<sup>45</sup> On this point, district courts had split between those adopting a “violation-only” theory, which reasoned that an insurer's noncompliance with the notice statutes automatically means that the policy remains in force, and a “causation” theory, which posits that a plaintiff must show that the insurer's noncompliance caused harm.<sup>46</sup>

The Ninth Circuit adopted the causation theory, reasoning that causation is an element of a cause of action for breach of contract.<sup>47</sup> Hence, where a policyholder knowingly lets their policy lapse, violation of those requirements causes no harm, notwithstanding any failure to comply with the notice requirements. Accordingly, class certification was not appropriate, as an individualized inquiry would be necessary as to each policy file.<sup>48</sup> But more importantly for potential plaintiffs, the *Small* decision means that it is not enough to show that the insurer failed to comply with the notice statutes; the plaintiff must show that the failure to comply actually caused the policy to lapse.

The holding in *Small* was reaffirmed by a different Ninth Circuit panel a few months later in *Farley v. Lincoln Benefit Life Company*.<sup>49</sup> As in *Small*, the representative plaintiff in *Farley* had her life insurance policy canceled without compliance with Insurance Code sections 10113.71 and 10113.72—although, unlike *Small*, *Farley* was the owner of the policy, rather than the beneficiary. While the district court denied class certification on *Farley*'s claims for monetary relief, it granted certification for declaratory and injunctive relief on behalf of “all owners, or beneficiaries upon a death of the insured” of Lincoln Benefit individual life insurance policies which did not comply with the statutory requirements.<sup>50</sup>

On appeal from the class certification order, the Ninth Circuit reversed, citing the causation requirement imposed by *Small*. As in *Small*, the insurer presented expert evidence about the presence of class members who intentionally lapsed their policies. Accordingly, *Farley* could not meet the typicality requirement for class certification.<sup>51</sup>

Finally, the Ninth Circuit reached the same conclusion, on a different procedural posture, in *Siino v. Foresters Life Insurance & Annuity Company*.<sup>52</sup> *Siino* sued after her life insurance policy was canceled due to nonpayment of premium, asserting that Foresters failed to comply with the statutory notice requirements. However, she did not receive any notices because she had moved and her change-of-address request was never processed.<sup>53</sup> Although her effort to maintain a class action failed, she pursued individual claims for declaratory relief and breach of contract.

On summary judgment, the district court declared that Foresters had failed to comply with the notice statutes, and that the policy remained valid and enforceable. In light of that ruling, the parties stipulated that *Siino* could reinstate the policy by tendering the missed premiums, resulting in the voluntary dismissal of the remaining claims. Foresters nonetheless appealed the resulting declaratory relief judgment.<sup>54</sup>

The Ninth Circuit rejected Foresters' argument that the declaratory relief claim should not have been entertained by the district court because it was duplicative of the breach of contract claim. While they were slightly duplicative, the adjudication of both could "serve a useful purpose in clarifying the legal relations at issue."<sup>55</sup> Indeed, that is essentially what happened when the declaratory relief ruling led to resolution of the breach of contract claim.

Ironically, though, the Ninth Circuit found that, while the district court correctly adjudicated that Foresters had failed to comply with the statutory notice provisions,<sup>56</sup> it erred in finding that the policy remained valid and enforceable. This was because a determination of the policy's continuing validity required a finding that noncompliance with the notice statutes caused the policy's termination as explained in *Small*. In this regard, the record was undisputed that Siino would not have received any notices from the insurance company since she failed to update her new address, so the termination of the policy could not have resulted from Foresters' failure to provide the statutorily required notices.<sup>57</sup> The Ninth Circuit thus reversed this aspect of the declaratory relief judgment, reaffirming *Small* in the process.

## **SECOND DISTRICT COURT OF APPEAL REVERSES SUMMARY JUDGMENT FOR INSURER IN BAD FAITH ACTION FOR DENIAL OF CLAIM FOR WATER DAMAGE DURING ROOF REPAIRS**

Water from two rainstorms penetrated the interior of a condominium complex while its roof was being repaired. The Homeowners Association<sup>58</sup> made a claim on its policy with Farmers Insurance Exchange, which denied the claim. The HOA sued for breach of contract and bad faith.<sup>59</sup> The trial court granted Farmers' motion for summary judgment, finding no coverage as a matter of law. The Second District Court of Appeal reversed.

The HOA had hired a roofer named Bardales who removed about 80% of the roof membrane, when a rainstorm damaged the exposed insulation and plywood and water entered about half the units.

Over the next three weeks, Bardales removed and replaced the damaged insulation and plywood, added base paper and felt, hot mopped and tarred much of the roof, and covered it with tarps, some of which blew off in a subsequent rainstorm during which water entered all the units and caused significant damage.

Farmers' policy covered "'direct physical loss of or damage to Covered Property' at the HOA's premises 'caused by or resulting from any Covered Cause of Loss,' defined as a 'Risk[ ] of Direct Physical Loss' unless excluded.<sup>60</sup> Farmers cited two coverage exclusions, "for loss or damage caused directly or indirectly by 'water,' 'regardless of any other cause or event that contributes concurrently or in any sequence to the loss,'" and "for loss or damage 'caused by or resulting from . . . [f]aulty, inadequate or defective . . . [p]lanning, . . . workmanship, repair, construction [or] renovation."<sup>61</sup>

But, as to the water damage exclusion, the policy provided Farmers would pay for "[w]ater damage to the interior of any building or structure caused by or resulting from rain, . . . whether driven by wind or not, if . . . [t]he building or structure first sustains damages by a Covered Cause of Loss to its roof or walls through which the rain . . . enters."<sup>62</sup> And the policy further provided that "'if an excluded cause of loss . . . results in a Covered Cause of Loss,' Farmers 'will pay for the loss or damage caused by that Covered Cause of Loss.'" <sup>63</sup>

Farmers based its denial on findings that rainwater entered the building through openings Bardales had intentionally made, not as a result of a covered accident or event; the tarps blowing off did not create an opening because once Bardales removed the roof membrane during repairs, there was no roof on the building; and, Bardales "did not meet the standard of care in their roofing processes[, and the Policy] . . . excludes faulty workmanship."<sup>64</sup>

The HOA sued, alleging Bardales removed the top layer of the roof, leaving only the roof's foundational plywood, and because it was not fully protected from the elements, when the storms hit, "the

building's roof was damaged[,] ultimately resulting in water intrusion to the walls and its interior."<sup>65</sup>

According to the HOA's complaint, the water exclusion "did not apply because the HOA's building 'sustained damage first to its roof and walls, through which the rain entered'[, and] . . . the faulty workmanship exclusion did not apply because California courts have interpreted this provision not to apply to 'faulty processes' employed by a contractor, and because the building 'first sustained damage to its roof before water entered the building.'"<sup>66</sup>

Farmers moved for summary judgment, and the trial court granted the motion, "concluding that the policy did not cover the HOA's losses because both the water damage exclusion and the faulty workmanship exclusion applied."<sup>67</sup> The HOA appealed and the Court of Appeal, after detailed and complex analysis, reversed.

The appellate court started by identifying the Farmers policy as "an 'all risks' or 'open peril' policy . . . that insured the HOA against all physical loss or damage to the HOA's covered property unless specifically excluded."<sup>68</sup> The court concluded "triable issues of material fact as to coverage under the water damage exclusion"<sup>69</sup> precluded summary judgment on that basis, and the faulty workmanship exclusion "does not unambiguously exclude coverage in this case."<sup>70</sup>

The Court of Appeal cited *Diep v. California Fair Plan Association*<sup>71</sup> as the only California case it was aware of that "addressed all-risk property coverage for losses that occur during roof repairs."<sup>72</sup> In that case, plastic sheeting installed during roof repairs was torn during a storm, and the Court of Appeal affirmed summary judgment for the insurer because the plastic sheeting did not constitute a roof. The *Diep* court reasoned the word "roof" "is commonly considered to be a permanent part of the structure it covers[, but] . . . the plastic sheeting was 'a nonstructural band-aid,' not a 'roof.'"<sup>73</sup>

After considering cases from other states interpreting water exclusions in all-risk property policies, the Court of Appeal analyzed their application in this case. At the outset, the court "reject[ed] Farmers' contention that the property was without a 'roof' when it suffered rain damage."<sup>74</sup> "The policy does not define 'roof,' and we agree with the cited cases that a common sense meaning of 'roof' includes a covering over a building that provides structural integrity and protection from the elements."<sup>75</sup> Because roofs must be periodically replaced, all structures will be left without full protection from the elements for at least short times—but the policy never "informed an insured that it would be without coverage for rain damage during periodic reroofing."<sup>76</sup> In view of the policy's definition of "'covered property' to include '[a]dditions under construction, alterations, and repairs to the building or structure,'" the court "conclude[d] that a roof under repair remains a 'roof' within the meaning of the policy."<sup>77</sup>

Because Bardales "removed just some of the roof's outer layers, leaving the lower layers intact," the court "conclude[d] that the remaining layers of roof, even without the roof membrane, were sufficient to constitute a 'roof' within the meaning of the policy."<sup>78</sup>

Farmers argued its policy did not cover damage due to "rainwater [that] entered the property through openings in the roof deliberately created by [Bardales], not as the result of fortuitous weather damage," but the Court of Appeals noted "the policy defines 'Covered Cause of Loss' to mean *any cause of physical damage* to the property not otherwise excluded" and it did not contain any "exclusion for losses that result from deliberate conduct."<sup>79</sup>

The appellate court further inferred from the exclusion for damages caused by negligent workmanship, but not workmanship generally, "that the policy does *not* exclude damages caused by workmanship that was not negligent."<sup>80</sup> So the court "conclude[d] that rain damage resulting from roof repairs are [*sic*] covered unless expressly excluded by another provision of the policy, such as the faulty workmanship exclusion," to which it turned next.<sup>81</sup>

The HOA, relying on *Allstate Insurance Company v. Smith*,<sup>82</sup> argued the faulty workmanship exclusion was ambiguous because it was reasonably susceptible to interpretation as “(1) the flawed quality of a finished *product* or (2) a flawed *process*.”<sup>83</sup> The Court of Appeal said it was unpersuaded by *Allstate’s* analysis, and concluded “workmanship” refers to both product and process. But the court found Farmers had failed to carry its burden to establish as a matter of undisputed fact “that the damage to the HOA’s property was ‘caused by or result[ed]’ from Bardales’s negligence.”<sup>84</sup>

The Court of Appeal cited “evidence that roof damage was caused not only by Bardales’s alleged negligence but also by wind and rain[, which] damaged the exposed plywood and insulation layers . . . and wind blew off tarps Bardales placed over the partially constructed roof.”<sup>85</sup> And the court acknowledged the HOA’s argument that even if Farmers was right that Bardales failed to follow industry standards by removing almost all the roof membrane at one time, the insurer “introduced no evidence that the roof repairs could have been done in a way that would have fully protected the property in the event of a rainstorm.”<sup>86</sup>

The appellate court said there was no question the HOA alleged that Bardales was negligent in replacing the roof, “but these allegations do not, as Farmers suggests, constitute a judicial admission that his negligence was the sole cause of damage. . . In short, the complaint alleged Bardales’s negligence was a cause, but not the *sole* cause, of the HOA’s losses.”<sup>87</sup>

In addition to reversing the judgment dismissing the HOA’s cause of action for breach of contract, the Court of Appeal also reversed the judgment on the bad faith claim. “[T]here is a reasonable interpretation under which recovery [under the policy] would be permitted, and thus Farmers is not entitled to summary adjudication of [the HOA’s] bad faith claim.”<sup>88</sup> And since Farmers had not demonstrated by undisputed evidence that the HOA could not prove Farmers’ denial of policy benefits was not just unreasonable or without proper cause, but malicious, oppressive, or fraudulent, the court

“reach[ed] a similar conclusion with regard to punitive damages.”<sup>89</sup>

The Supreme Court has granted review of *Woodbridge*, so it will have the final word as to this issue presented: “Does a provision within an ‘all-risk’ property insurance policy providing that the insurer will pay for ‘[w]ater damage to the interior of any building or structure caused by or resulting from rain’ if the ‘building or structure first sustains damages’ to the ‘roof or walls through which the rain . . . enters’ operate to exclude coverage for damage caused by rain that entered a building while its roof was being replaced?”<sup>90</sup>

## THIRD PARTY POLICIES

### MOLESTATION EXCLUSION BARS CLAIMS AGAINST SPA OWNER AND MANAGER

In case customers of a massage spa sued its owner, Shen, and manager, Xin, alleging the owner sexually assaulted and molested them during massage sessions. The defendants tendered the claim to their commercial general liability insurer, Continental Casualty Company, which refused to provide a defense based on exclusions in the policy for “bodily or personal injury ‘arising out of’ the ‘actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured,’ (subsection (a)) and for “the negligent employment or supervision ‘of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by” the abuse or molestation exclusion (subsection (b)).<sup>91</sup> After entry of a stipulated judgment for \$6.8 million, and an assignment of the insured’s rights against Continental in exchange for a covenant not to execute on the judgment against the insureds, both plaintiffs and the insureds sued Continental for breach of contract and bad faith. The trial court granted Continental’s summary judgment motion, plaintiffs and the insureds appealed, and the Court of Appeal affirmed.

On appeal, plaintiffs argued the molestation exclusion did not apply because they were not in

the insured’s “care, custody, or control.” They cited authority interpreting the phrase in an exclusion to apply “only where the insured had exclusive or complete control—and not shared control—over the property that is damaged.”<sup>92</sup> But the Court of Appeal distinguished that case because it “involved the custody or control of property, not human beings.”<sup>93</sup> The Court of Appeal noted “the *McMillin* court cautioned this judicial construction applied only ‘in a sufficiently analogous context,’”<sup>94</sup> and the plaintiffs’ claims were not sufficiently analogous. The Court of Appeal quoted with approval the trial court’s observation that “a good description of what ‘exclusive and complete’ control of another might look like can be found in the underlying *Compliant*, which repeatedly alleges that Shen refused to allow [the Gordon plaintiffs] to leave his massage table when they attempted to exit, physically pushing [the Gordon plaintiffs] back onto the table.”<sup>95</sup>

No California court had interpreted “care, custody or control” in the context of a molestation exclusion, so the Court of Appeal looked to dictionary definitions and cases from other jurisdictions, construing “the ‘care, custody or control’ language in the context of the abuse or molestation exclusion” consistent with “case law from federal and state courts applying the law of District of Columbia, Indiana, Kentucky, Massachusetts, Missouri, and Wyoming” to hold the molestation exclusion applied to the plaintiffs’ claims against the owner who abused them.<sup>96</sup>

The Court of Appeal then turned to applying the exclusions to claims against the spa’s manager. Plaintiffs alleged the manager had negligently trained the abuser, and neither exclusion listed “training.” But plaintiffs’ “bodily injur[ies] arose out of (i.e., originated or flowed from) Shen’s sexual assault and molestation, and therefore, Xin’s alleged negligent training of Shen falls within subsection (a) of the exclusion.”<sup>97</sup>

The appellate court also held subsection (b) applied to plaintiffs’ claim for Negligent Hiring, Training and Supervision. “Although negligent training is not listed in subsection (b), it is encompassed within negligent

hiring, training, and supervision, which are expressly excluded.”<sup>98</sup>

#### **FOURTH DISTRICT COURT OF APPEAL AFFIRMS DECLARATORY JUDGMENT FOR INSURER THAT INSURED’S ATTACK ON HOUSEMATE WAS NOT COVERED BECAUSE NOT ACCIDENT OR OCCURRENCE**

The California Supreme Court decided 16 years ago in *Delgado v. Interinsurance Exchange of Automobile Club of Southern California*,<sup>99</sup> that “an injury-producing event is not an ‘accident’ . . . when all of the acts, the manner in which they were done, and the objective accomplished occurred as intended by the actor.”<sup>100</sup> In *Liberty Surplus Insurance Corporation v. Ledesma & Meyer Construction Company*,<sup>101</sup> the Supreme Court reiterated the settled meaning of “the term ‘accident’ in a liability insurance policy in California[:] . . . ‘an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause.’”<sup>102</sup>

Given these precedents, the Fourteen District’s opinion in *State Farm Fire and Casualty Company v. Diblin*<sup>103</sup> was no surprise.

State Farm had “issued Curtis Diblin a homeowners policy that covered injuries arising from an ‘occurrence,’ which the policy defined as an ‘accident.’”<sup>104</sup> Diblin attacked his housemate, Monee Gagliardo, by repeatedly striking her over the head with a mallet. Gagliardo sued Diblin and a jury awarded her more \$2,500,000 in compensatory damages.

After State Farm agreed to fund an appeal of Gagliardo’s jury verdict, Diblin settled with her, “assign[ing] to Gagliardo his contract and bad faith rights under the Policy.”<sup>105</sup> “More than four years after final judgment was entered in the underlying proceeding, Gagliardo filed a document titled ‘Second Amended Complaint.’”<sup>106</sup> That pleading added allegations that “Diblin ‘breached the duty of care by being mindful [*sic*] of the side effects of using prescribed testosterone . . . and failing to seek further medical assistance’ despite ‘feeling

out of sorts mentally and physically’ . . . [and that] Diblin breached the duty of care by failing to ‘keep adequate distance’ from Gagliardo ‘and/or advising [her] that he was not feeling comfortable in his body . . . all of which was a proximate cause of the harm he caused to Plaintiff.’”<sup>107</sup> The pleading on which the jury verdict and judgment were based “made no mention of” those facts.<sup>108</sup>

State Farm sued Diblin and Gagliardo for a declaratory judgment that it owed Diblin no duty to indemnify him for Gagliardo’s judgment. The trial court found for State Farm because Diblin’s liability “did not arise from an ‘occurrence,’ as is required for coverage under the [State Farm] Policy, and also found in the alternative that even if coverage under the coverage provision were assumed, the Policy’s exclusion for damages caused by willful or intentional conduct and/or Insurance Code section 533 eliminate the possibility of indemnification for the damages awarded in the underlying action.”<sup>109</sup>

Diblin and Gagliardo appealed they presented three arguments on appeal: (1) that the trial jury’s finding of negligence compelled coverage; (2) that even if Diblin’s intentional tort caused Gagliardo harm, his negligence, as found by the jury, was an independent concurrent cause; and (3) that the trial court could not have applied section 533 without empaneling a separate jury to determine whether Diblin acted with a “preconceived design to injure.”<sup>110</sup> The Court of Appeal determined, however, that “the jury verdict in the underlying case establishes that Gagliardo’s injuries were not the results of an ‘occurrence’ under the Policy’s *coverage* provision [, so] . . . the claim does not come within the coverage provision,” and it affirmed the trial court.<sup>111</sup>

The Court of Appeal rejected the argument for coverage based on the jury verdict of negligence. “[T]he verdict form and the jury instructions confirm that the jury believed Diblin’s injury-producing conduct was deliberate and intentional *and* that this deliberate conduct constituted a breach of the duty of care Diblin owed to Gagliardo.”<sup>112</sup>

The court dispensed in a footnote with Gagliardo’s apparent attempt to create with the second amended complaint the inference that Diblin’s conduct was not intentional, but the result of breaching duties of care to be mindful of side effects of prescribed testosterone and to warn Gagliardo to keep adequate distance from him. Because Gagliardo had not “sought or obtained leave to file the purported second amended complaint in the underlying action when she submitted it for filing[,] . . . the purported second amended complaint has no effect.”<sup>113</sup>

The Court of Appeal refused to accept the concurrent independent cause argument. The doctrine imposes on the insurer “a duty to indemnify an insured if a covered risk is a proximate cause of the injury, even if a noncovered risk also jointly caused the injury in question.”<sup>114</sup> But it does not apply if the concurrent causes did not operate “totally independently of one another.”<sup>115</sup> The court reiterated it was “unconvinced the jury’s verdict reflected it was holding Diblin liable for two separate types of conduct when it found that Diblin committed gender violence and that he acted negligently.”<sup>116</sup> But even if that were true, the court concluded “the purported noncovered and covered causes of the injury are not *independent* of each other.”<sup>117</sup> “The failure to address the side effects of the testosterone or to warn Gagliardo about his experience of the violent side effects were not risks that themselves could have caused Gagliardo harm. It is only when these omissions are coupled with Diblin’s violent conduct that any injury could have possibly resulted.”<sup>118</sup>

Finally, as to the trial court’s decision that section 533 and the policy’s willful conduct exclusion applied to defeat coverage without swearing a separate jury, the Court of Appeal held it was not necessary to consider any exclusions because the jury decided there was no coverage.

## BAD FAITH

### TITLE INSURER LIABLE FOR BAD FAITH FAILURE TO DEFEND

One of the few published decisions in 2025 addressing bad faith, *Bartel v. Chicago Title Insurance Company*,<sup>119</sup> involved the duty to defend under a title insurance policy. Bartel's neighbor twice sued him, asserting a right to use a private road that crossed Bartel's property in connection with the neighbor's marijuana cultivation operation. The neighbor's first complaint in 2010 asserted a prescriptive easement, although it attached as an exhibit a deed that ultimately served as the basis for a judgment in the neighbor's favor. The complaint also referenced a road maintenance agreement recorded on September 2, 1970. Although Bartel tendered the complaint to Chicago Title, the neighbor dismissed the case without prejudice before Chicago Title took a position.<sup>120</sup>

However, the neighbor then re-filed essentially the same complaint in 2011, once again attaching the grant deed. This time, Chicago Title refused to defend based on exclusions for easements "which are not shown by the public record," and for claims based on the 1970 road maintenance agreement. Chicago Title maintained its refusal to defend despite incongruities in the parcel map that accompanied the policy and the allegations of the complaint.<sup>121</sup> After about a year of litigation, the neighbor once again dismissed without prejudice.

Bartel then decided to take matter into his own hands, filing an action for quiet title and nuisance in 2013. In response, the neighbor filed a cross-complaint and alleged a new theory that the easement was included in recorded grant deeds. Nonetheless, Chicago Title still refused to defend, arguing that the "gravamen" of the cross-complaint still concerned an easement created under the 1970 road maintenance agreement.<sup>122</sup> Bartel tendered again when the neighbor filed a motion for summary adjudication that expressly relied on the grant deed that had been attached to the very first complaint. Although Chicago Title initially declined to change

its position, it subsequently rethought that decision, and agreed to defend as of January 19, 2015—the date the motion for summary adjudication was provided to Chicago Title, and nearly five years after the original complaint was filed.<sup>123</sup>

The neighbor ultimately prevailed at trial, proving it had an express easement based on a deed executed at the time the properties were subdivided in 1971, and the subsequent chain of title. Chicago Title then modified its acceptance of the tender back though the date of the cross-complaint and paid Bartel for the diminution of value of his property based on the easement in the amount of \$170,000.<sup>124</sup>

Bartel sued Chicago Title for breach of contract and bad faith, seeking its earlier attorney fees, as well as additional damages for bad faith, including punitive damages.<sup>125</sup> After a phase one bench trial, the trial court found that Chicago Title had a duty to defend as of Bartel's initial tender, given that the original complaint had attached the very deed that ultimately formed the basis for the adverse judgment against Bartel.<sup>126</sup> However, in a second phase, the trial court found that, while Chicago Title could have performed a more expeditious and comprehensive investigation, it did not act in bad faith given the complexity of the underlying facts.<sup>127</sup> The trial court also found that the diminution in value was actually \$400,000, yielding a judgment of \$230,000 in favor of Bartel, plus prejudgment interest.<sup>128</sup>

The Sixth District Court of Appeal affirmed that Chicago Title breached the duty to defend, but reversed the finding that Chicago Title did not act in bad faith. As to the duty to defend, even though the original complaints sought only a prescriptive easement, the attachment of a grant deed was enough to create a "mere *possibility* that facts extrinsic to the complaint might reveal a claim that could be covered."<sup>129</sup> This was sufficient to trigger the duty to defend.

Because the relevant facts related to Bartel's tender requests and Chicago Title's investigation and denials were undisputed, the court reviewed the bad faith claim *de novo*, extending no deference to the

trial court's determination.<sup>130</sup> While the trial court let Chicago Title off the hook due to the complexity of facts associated with the underlying easement claims, the Court of Appeal found that complexity actually weighed against the insurer, since it increased the possibility of a covered claim. Thus, Chicago Title's handling of Bartel's repeated tenders and its narrow consideration and investigation into the facts were objectively unreasonable, constituting bad faith.<sup>131</sup> In light of its finding on bad faith, the court remanded the matter so Bartel could seek his *Brandt* fees<sup>132</sup> incurred pursuing coverage, as well as emotional distress damages.<sup>133</sup> However, Bartel could not seek punitive damages because the Court of Appeal affirmed the trial court's finding that Chicago Title's misconduct did not meet the heightened standard for such an award.<sup>134</sup>

### **FIRST DISTRICT COURT OF APPEAL REVERSES JUDGMENT FOR INSURED BASED IN PART ON SUMMARY ADJUDICATION OF DEFENSE THAT CARRIER ACCEPTED POLICY LIMITS DEMAND**

Just about every year, it seems there is at least one published case where the court rejects a plaintiff's attempt to use the insurer's failure to comply with conditions of a policy limit demand to "blow the lid" off the policy and recover more than the limit. In this year's example, USAA Casualty Insurance accepted a demand in a letter from an injured plaintiff's lawyer, and sent payment of \$100,000 a few days before the deadline, but the release listed the plaintiff's wife, who claimed loss of consortium, as a "releasee" instead of a releasor.<sup>135</sup>

Four days before the deadline, USAA followed up with a fax letter saying it understood the carrier had "met all required conditions outlined in your demand letter. If you require anything else, please contact USAA."<sup>136</sup> Plaintiffs' counsel did not respond, but on the last day, USAA faxed a revised release correcting the error, which the Plaintiffs' counsel received about 65 minutes late. The plaintiffs rejected USAA's revised release, and returned the payment, because "there was no execution of the terms of acceptance prior to the deadline."<sup>137</sup>

The plaintiffs, Gary and Pamela Birdsall, sued, and the answer filed by USAA's insured, Barton Helfet, included an affirmative defense that there was a prior compromise and settlement, and tender of consideration, that extinguished the plaintiffs' claims. The Birdsalls moved for summary adjudication of that affirmative defense, arguing there was no settlement as a matter of law because the original release was ineffective and the corrected version was too late. The trial court granted the plaintiffs' motion. The case went to trial, and the jury awarded \$4,642,190.86 to Gary Birdsall and \$550,000 to Pamela Birdsall.

USAA appealed, and the First District Court of Appeal reversed. Reviewing the summary adjudication de novo, the court applied contract principles to find a triable issue of material fact regarding whether the parties had agreed to a policy limits settlement.

The appellate court analyzed whether there was mutual consent to settle on the terms the Birdsalls' lawyer proposed. The court cited multiple authorities in observing that "[t]he existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe."<sup>138</sup> Whether USAA accepted the Birdsalls' offer was a question of fact to be judged by "what a reasonable person in the position of the parties would have thought it meant."<sup>139</sup>

The Court of Appeal looked at "outward manifestations" such as USAA's letter with "CLAIM SETTLEMENT" at the top and the opening statement that "we accept your offer," along with enclosing two of three items the Birdsalls' lawyer asked for in his demand letter, and sending the third requested item the following day.<sup>140</sup> The court distinguished the plaintiffs' cited authority providing that "terms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract,"<sup>141</sup> because USAA was not adding a new term to the offer. The court noted even the Birdsalls conceded it was "not the

intent of the parties” that Pamela be a releasee.<sup>142</sup> “[T]he release sent with the acceptance letter that had Pamela as a releasee rather than a releasor . . . was obviously a mistake.”<sup>143</sup> The fact that it did not comport precisely with the demand was not dispositive of intent, which “is the issue here. It is a fact question.”<sup>144</sup>

“In conclusion, on this issue we hold—and it is all we hold—that the ‘outward manifestations’ were such that they presented a triable issue of material fact such that a ‘reasonable person’ could find consent, and thus to grant summary adjudication was error.”<sup>145</sup>

## PRACTICE AND PROCEDURE

### NINTH CIRCUIT UPHOLDS DISMISSAL ON RIPENESS GROUNDS OF INSURED’S CLAIM FOR DAMAGE TO PROPERTY BEFORE APPRAISAL REQUIRED BY POLICY

In casename, frozen pipes burst and caused water damage to a property in Rhode Island owned by 50 Exchange Terrace LLC, a Rhode Island limited liability company. 50 Exchange tendered a claim to its carrier, Mt. Vernon Specialty Insurance Company, which “disagreed on the cost of repairs [but] paid its estimated value (less depreciation and a deductible).”<sup>146</sup> Mt. Vernon also demanded appraisal as required under the policy “in the event the parties disagree about the amount of the loss.”<sup>147</sup> 50 Exchange sued in state court in California, where one member resides, alleging Mt. Vernon wrongfully withheld compensation while the appraisal was pending. Mt. Vernon removed the case to federal court and moved to dismiss for forum non conveniens. The district court “ordered supplemental briefing on ripeness and article III standing and then dismissed the action for lack of both.”<sup>148</sup>

The Ninth Circuit affirmed “because 50 Exchange has not sustained an actionable injury before the extent of any disputed loss has been determined through the agreed-upon appraisal process.”<sup>149</sup>

“[T]he extent of any loss cannot be determined by a court until an appraisal is complete.”<sup>150</sup>

The Court of Appeals said “the district court correctly resolved this straightforward issue of ripeness and standing.”<sup>151</sup> The court acknowledged the opinion did “not break new ground,” but advised that it had “chosen to issue this decision as a precedential opinion in the hope of deterring or at least short-circuiting other similarly premature cases where the agreed insurance appraisal process has not yet been completed.”<sup>152</sup>

### NINTH CIRCUIT HOLDS POTENTIAL DAMAGES EXCEEDING POLICY LIMITS AND ANTICIPATED FUTURE COSTS OF DEFENSE SATISFY AMOUNT-IN-CONTROVERSY REQUIREMENT FOR DIVERSITY JURISDICTION

Dennis Perez was insured by Farmers Direct Property and Casualty Insurance Company when he got into a car accident that severely injured Victor Montez. Perez was criminally charged with driving under the influence and served two years in jail after pleading nolo contendere. “The Montezes alleged Perez’s ‘legal intoxication’ caused the accident and the resulting ‘severe injuries’ to Victor Montez, but Perez claimed that he unexpectedly hit a puddle, causing his vehicle to hydroplane into oncoming traffic.”<sup>153</sup>

Montez sent Farmers Direct a handwritten letter making a policy limits settlement demand, asking if Perez was acting in the course and scope of employment when the accident occurred and whether he had any other insurance coverage. Farmers Direct replied with a policy limits settlement offer of \$25,000, confirming “that the ‘vehicle was being used for personal use at the time of the accident and not for work or employment[,]’ and stating that ‘there is no other insurance for this loss.’”<sup>154</sup>

Farmers Direct provided a defense to Perez, but it eventually lost contact with him, and, after Perez failed to sit for deposition and to provide court-ordered discovery responses, the trial court struck

his answer and defaulted him—but not before Farmers Direct intervened in the action on his behalf, incurring “over \$100,000 in defense fees.”<sup>155</sup>

Farmers Direct filed a declaratory relief action in district court, alleging Perez breached the policy’s cooperation clause, relieving the carrier of any duty to defend or indemnify him. The district court entered judgment for Farmers Direct, though the insurer continued to defend Perez in the underlying tort action. The tort action went to trial, and the jury returned a verdict for Montez totaling more than \$13 million. Farmers Direct paid Montez its \$25,000 policy limits.

Montez filed a motion in Farmers Direct’s declaratory judgment action to intervene and to vacate the judgment as “void because the [district] [c]ourt lacked subject matter jurisdiction.”<sup>156</sup> The district court granted the motion to vacate because the amount in controversy was the \$25,000 policy limit, less than the diversity jurisdictional minimum of \$75,000.

On appeal, Farmers Direct argued the value of the tort action was not limited to the policy’s maximum liability. According to Farmers Direct, a court considering whether an exercise of jurisdiction is “truly unsupported,” such that a judgment “lacks even a colorable basis” and is therefore void should consider “either the potential excess liability from the underlying claim or Farmers Direct’s anticipated future defense fees and costs, or both.”<sup>157</sup> The Ninth Circuit decided it was both: Farmers Direct’s potential excess liability or its anticipated future defense costs satisfied the amount in controversy requirement.

Long-standing precedent holds an insurer that rejects a reasonable settlement offer within policy limits may become obligated to pay more than those limits.<sup>158</sup> The Ninth Circuit observed Montez’s apparent “goal all along has been to recover from Farmers Direct an amount in excess of the \$25,000 policy limit—apparently by setting aside the Judgment, obtaining an assignment of a bad faith claim from Perez, and then suing Farmers Direct for

bad faith.”<sup>159</sup> So, the court found, “the value of the underlying potential tort action is not the Policy’s limit, because there is a legal possibility that Farmers Direct may be liable for an amount in excess of that limit.”<sup>160</sup>

Additionally, because “[t]here is at least an arguable basis that at the time the district court entered its [default] Judgment, Farmers Direct likely would have incurred more than \$75,000 in fees and costs defending Perez in the underlying action,” the Court of Appeals found “Farmers Direct’s ‘claim in excess of the requisite amount’ of anticipated future defense fees and costs was ‘made in good faith’ in its Complaint,” so the amount of those fees and costs also satisfied the amount-in-controversy requirement.<sup>161</sup>

“[T]here is at least an arguable basis that the value of the default judgment Farmers Direct sought (and obtained) is greater than \$75,000.”<sup>162</sup> In a footnote, the court observed, “[g]iven the procedural posture—a Rule 60(b)(4) motion attacking a final judgment as void—we need to find only that there was an ‘arguable basis’ for jurisdiction. We need not and do not decide whether the Judgment actually precludes Perez from bringing or assigning a bad faith claim, a question which the parties have not briefed.”<sup>163</sup>

The Ninth Circuit found that Farmers Direct had established by a preponderance of the evidence that there was a legal possibility that it could be subject to liability in excess of the policy limit because the claim, or future defense costs and fees, or both, exceeded the limit. “Because there was at least an arguable basis that the amount-in-controversy requirement was satisfied,” the court reversed the district court’s decision to vacate the judgment in Farmers Direct’s declaratory relief action.<sup>164</sup>

## ENDNOTES

1. (2024) 15 Cal.5th 1106 (*Another Planet*).
2. (2025) 108 Cal.App.5th 730 (*Gharibian*).
3. *Id.* at p. 733.
4. *Id.* at p. 736.

5. *Id.* at p. 738 (citing *Another Planet, supra*, 15 Cal.5th at p. 1117).
6. *Ibid.* (citing *Another Planet, supra*, 15 Cal.5th at pp. 1140, 1149).
7. (N.D.Cal. Jan. 10, 2025, No. 21-CV-03614) 2025 U.S. Dist. LEXIS 5666, \*4 (*Bottega*).
8. *Id.* at p. \*8.
9. (2021) 71 Cal.App.5th 688 (*Inns-by-the-Sea*).
10. *Bottega, supra*, 2025 U.S. Dist. LEXIS 5666 at p. \*11 (citing *Inns-by-the-Sea, supra*, 71 Cal.App.5th at p. 703).
11. *Id.* at p. \*12.
12. Ruling on Submitted Matter re: Motion for Summary Adjudication, *Aliff v. Cal. Fair Plan Assn.* (L.A. Sup. Ct., June 24, 2025 No. 21STCV20095) (*Aliff*).
13. (CFP.)
14. *Aliff, supra*, at p. 7.
15. *Id.* at p. 11.
16. *Id.* at pp. 12–13 (citing *Another Planet, supra*, 15 Cal.5th at pp. 1136, 1140 (citations omitted)).
17. *Id.* at p. 15.
18. *Id.* at p. 18.
19. (2024) 107 Cal.App.5th 73.
20. *Id.* at pp. 77–78.
21. *Id.* at p. 78.
22. *Id.* at p. 80.
23. *Id.* at p. 82 (citation omitted).
24. *Id.* at p. 84.
25. *Id.* at p. 86.
26. *Murphy v. AAA Auto Insurance of Southern California* (2025) 108 Cal.App.5th 476, 479 (*Murphy*).
27. *Id.* at p. 482 (citing *Steven v. Fidelity & Casualty Co.* (1962) 58 Cal.2d 862, 878).
28. *Id.* at p. 483.
29. *Id.* at p. 481 (citing Lab. Code, § 2802, subd. (a)).
30. *Id.* at pp. 481–482.
31. *Id.* at p. 483.
32. *Zenith Ins Insurance Co. v. Workers' Compensation Appeals Board.* (2025) 110 Cal.App.5th 1164, 1171 (*Zenith*).
33. *Id.* at p. 1170.
34. *Id.* at pp. 1172–1173.
35. *Id.* at p. 1171.
36. *Id.* at p. 1173.
37. *Ibid.* (citing Lab. Code, § 3202).
38. *Ibid.*
39. *Ibid.*
40. *Id.* at p. 1175.
41. *Id.* at p. 1176.
42. (9th Cir. 2024) 122 F.4th 1182 (*Small*).
43. *Id.* at p. 1189.
44. *Ibid.*
45. *Id.* at p. 1191.
46. *Id.* at p. 1192.
47. *Id.* at pp. 1196–1197.
48. *Id.* at p. 1200.
49. (9th Cir. 2025) 150 F.4th 1197.
50. *Id.* at p. 1200.
51. *Id.* at pp. 1203–1204.
52. (9th Cir. 2025) 133 F.4th 936.
53. *Id.* at p. 940.
54. *Id.* at p. 942.
55. *Id.* at p. 944.
56. *Id.* at p. 948.
57. *Id.* at p. 950.
58. (HOA.)
59. *11640 Woodbridge Condominium Homeowners Association v. Farmers Insurance Exchange* (2025) 110 Cal.App.5th 211 (*Woodbridge*).
60. *Id.* at p. 216.
61. *Id.* at pp. 216–217.
62. *Id.* at p. 216.
63. *Id.* at p. 217.
64. *Ibid.*
65. *Id.* at pp. 217–218.
66. *Id.* at p. 218.
67. *Id.* at p. 220.
68. *Id.* at p. 223.
69. *Ibid.*
70. *Id.* at p. 230.
71. 15 Cal. App.4th 1205 (1993) (*Diep*).
72. *Woodbridge, supra*, 110 Cal.App.5th at p. 224.
73. *Ibid.* (citing *Diep, supra*, 15 Cal.App.4th at pp. 1208–1209).
74. *Id.* at p. 227.

75. *Ibid.*
76. *Ibid.*
77. *Id.* at p. 228.
78. *Ibid.*
79. *Ibid.*
80. *Id.* at p. 228.
81. *Ibid.*
82. (9th Cir. 1991) 929 F.2d 447 (*Allstate*).
83. *Woodbridge*, *supra*, 110 Cal.App.5th at p. 229.
84. *Id.* at p. 230.
85. *Ibid.*
86. *Ibid.*
87. *Id.* at p. 231.
88. *Id.* at p. 232.
89. *Ibid.*
90. *11640 Woodbridge Condominium Homeowners Assn. v. Farmers Insurance Exchange*, No. S290750 (Cal. 2026) Issues Presented, Cal. Supreme Court, <[https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc\\_id=3130465&doc\\_no=S290750&request\\_token=NilwLSEnPkW8WyAtSCJNXE9IQEA0UDxTKiJeWz9TMCAgCg%3D%3D](https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=3130465&doc_no=S290750&request_token=NilwLSEnPkW8WyAtSCJNXE9IQEA0UDxTKiJeWz9TMCAgCg%3D%3D)>.
91. *Gordon v. Continental Casualty Co.* (2024) 107 Cal. App.5th 89, 93 (*Gordon*).
92. *Id.* at p. 102 (citing *McMillin Homes Construction, Inc. v. National Fire & Marine Insurance Co.* (2019) 35 Cal. App.5th 1042, 1053).
93. *Id.* at p. 98.
94. *Id.* at p. 102.
95. *Id.* at p. 98.
96. *Id.* at p. 104, fn. 16.
97. *Ibid.*
98. *Ibid.*
99. (2009) 47 Cal.4th 302 (*Delgado*).
100. *Id.* at pp. 311–312.
101. (2018) 5 Cal.5th 216 (*Liberty Surplus*).
102. *Id.* at p. 221.
103. (2025) 114 Cal.App.5th (*Diblin*).
104. *Id.* at p. 691.
105. *Id.* at p. 695.
106. *Ibid.*
107. *Ibid.*
108. *Id.* at p. 692.
109. *Id.* at p. 696.
110. *Id.* at pp. 696–697.
111. *Id.* at p. 704.
112. *Id.* at p. 700.
113. *Id.* at p. 701, fn. 3.
114. *Id.* at p. 701.
115. *Id.* at p. 702.
116. *Id.* at p. 703.
117. *Ibid.*
118. *Ibid.*
119. (2025) 111 Cal.App.5th 655 (*Bartel*).
120. *Id.* at pp. 668–669.
121. *Id.* at pp. 669–670.
122. *Id.* at pp. 671–672.
123. *Id.* at p. 672.
124. *Id.* at p. 673.
125. *Id.* at p. 674.
126. *Id.* at p. 675.
127. *Id.* at p. 676.
128. *Id.* at p. 677. Chicago Title voluntarily paid the defense fees incurred in connection with the two original actions following the phase one interim findings. *Id.* at p. 704, fn. 14.
129. *Id.* at p. 687.
130. *Id.* at p. 699.
131. *Id.* at p. 702.
132. *Brandt v. Superior Court* (1985) 37 Cal.3d 813.
133. *Bartel*, *supra*, 111 Cal.App.5th at p. 705.
134. *Id.* at p. 707.
135. *Birdsall v. Helfet* (2025) 113 Cal.App.4th 558 (*Birdsall*).
136. *Id.* at p. 565.
137. *Id.* at p. 566.
138. *Id.* at p. 569 (citing *Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 789; *J.B.B. Investment Partners, Ltd. v. Fair* (2019) 37 Cal.App.5th 1, 11).
139. *Id.* at p. 569.
140. *Ibid.*
141. *Id.* at p. 570 (citing *Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855).
142. *Ibid.*
143. *Id.* at p. 569.
144. *Id.* at p. 570.

145. *Id.* at p. 571.
146. *50 Exch. Terrace LLC v. Mt. Vernon Specialty Insurance Co.* (9th Cir. 2025) 129 F.4th 1186, 1188 (*50 Exchange*).
147. *Ibid.*
148. *Ibid.*
149. *Ibid.*
150. *Ibid.*
151. *Id.* at p. 1189.
152. *Ibid.*
153. *Farmers Direct Property and Casualty Insurance Co. v. Perez* (9th Cir 2025) 130 F.4th 748, 750–751 (*Farmers Direct*).
154. *Id.* at p. 751.
155. *Ibid.*
156. *Id.* at p. 752.
157. *Id.* at p. 753.
158. *See, e.g., Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 237.
159. *Farmers Direct, supra*, 130 F.4th at p. 755.
160. *Id.* at pp. 754–755.
161. *Id.* at p. 756.
162. *Id.* at p. 755.
163. *Id.* at p. 755, fn. 7.
164. *Id.* at p. 756 (citation and punctuation removed).

# MILITARY AND VETERAN HIGHLIGHTS OF 2025

Written by Eileen C. Moore\*



## CALIFORNIA CIVIL LAW

A barrier to many litigants in civil courts is the payment of court costs. When a veteran suffering from a condition resulting from military service such as post-traumatic stress disorder<sup>1</sup> is receiving disability benefits, the courts have been considering those benefits as income when a veteran requests a waiver of court costs using Judicial Council Form FW-001. As of January 1, 2026, Government Code section 68632 has been amended to exclude “veterans disability service-connected compensation” from being considered income. This statutory change was largely the result of the efforts of Army veteran Latia Suttle, a 2025 Center for Women Veterans Trailblazer.<sup>2</sup>

Another statute beneficial to veterans was amended as of January 1, 2025, Civil Code section 1770, part of the Consumers Legal Remedies Act.<sup>3</sup> This statute designates certain acts as deceptive or unfair. As it relates to veterans, it prohibits charging an unreasonable fee for public social services, including services provided by the United States and/or California Departments of Veterans Affairs, such as pension benefits. It also makes it unlawful to advertise seminars or workshops regarding veteran benefits absent both an oral and written statutory statement about authorization. A bill currently under consideration would expand these CLRA prohibitions to additional veterans’ benefits, bar unaccredited individuals from assisting with claims, and strengthen safeguards for veterans’ personal information.<sup>4</sup>

## CALIFORNIA CRIMINAL LAW

Until recently, military diversion was only available to veterans accused of committing misdemeanor crimes. But as of January 1, 2025, veterans charged with committing most felony crimes will now have an opportunity to be diverted from prosecution. Under Penal Code section 1001.80, subdivision (c), this expanded eligibility excludes certain serious offenses, such as murder and specific sex crimes, as listed in subdivision (o). The primary objective of military diversion is

for the court to consider whether an eligible veteran defendant will benefit from education, treatment and rehabilitation.<sup>5</sup>

Another issue concerning military diversion over the last year addressed whether the trial court must find a defendant suitable for diversion after determining eligibility. In *Angulo v. Superior Court*,<sup>6</sup> the defendant, a former Marine, was charged with misdemeanor driving under the influence pursuant to Vehicle Code section 23152. The trial court denied his request for military diversion under Penal Code section 1001.80. The Court of Appeal noted that section 1001.80 does not include express language that a defendant must be suitable for pretrial diversion even if found eligible, but that the statute grants discretionary authority to the trial court to deny pretrial diversion by using the term “may” in subdivision (d). Issuing a writ of mandate after the veteran’s request for diversion was denied, the appeals court stated: “The trial court should consider both whether a defendant is eligible for military diversion, and then evaluate the defendant’s suitability for diversion taking into account the rehabilitative purpose of Penal Code section 1001.80.”<sup>7</sup>

The Court of Appeal addressed yet another diversion issue in *Segura v. Superior Court*.<sup>8</sup> It held that section 1001.80 does not require a nexus between the veteran’s condition and the crime when the charge is a misdemeanor. It also concluded a lower burden of proof than both beyond a reasonable doubt and preponderance of evidence applies in the context of military diversion. In *Segura*, defendant, a military veteran, was charged with misdemeanor driving under the influence and requested diversion pursuant to section 1001.80. The trial court denied his request, and he sought extraordinary relief in the Court of Appeal. Issuing a writ of mandate, the appellate court stated: “[I]t appears the court erred by requiring Segura to show a relationship (a ‘nexus’) between his qualifying condition (‘alcohol abuse’) and the commission of the offenses (‘the incident’). Further, we are uncertain what burden of proof the trial court applied. [¶] . . . [T]he person only has the burden to show that he or she ‘may be suffering

from [a qualifying condition] as a result of their military service.’ [¶] We hold that the Legislature’s choice of the word ‘may’ was intentional and means a defendant has the burden to show a *reasonable possibility* that he or she is suffering from a qualifying condition as a result of their military service.”<sup>9</sup>

Regarding Penal Code section 1170.91, the resentencing statute for military veterans, *People v. Hayde* addressed the trial court’s denial of a veteran’s request for resentencing.<sup>10</sup> Defendant, a military veteran who had suffered severe childhood abuse and later experienced flashbacks during live-fire training, had been sentenced to 20 years in prison for possessing a weapon and a large amount of ammunition as a felon. He returned to court seeking resentencing under section 1170.91. Reversing the trial court’s denial of resentencing, the Court of Appeal stated: “[T]he trial court’s reliance on the lack of a demonstrated nexus between Hayde’s mental disorders and his commitment offense was error. [¶] The trial court compounded this error by refusing to consider another factor that was highly relevant to the suitability question: Hayde’s exemplary rehabilitation efforts during his lengthy incarceration. [¶] . . . [¶] We conclude that, by basing its decision in part on an irrelevant factor and refusing to consider a highly relevant factor, the trial court abused its discretion by denying resentencing to Hayde.”<sup>11</sup>

## CALIFORNIA FAMILY LAW

As noted above, recent amendments to Government Code section 68632 exclude “veterans disability service-connected compensation” from being considered income for purposes of court cost waivers. While this change applies broadly, it has particular significance in the family law context, where financial barriers can limit a veteran’s ability to pursue child custody or visitation.

One of the heftiest costs in child custody matters involves an order for an expert evaluation pursuant to Evidence Code section 730, Family Code section 3111, and/or California Rules of Court, rule 5.220. It’s not clear whether the cost of such

an evaluation is considered a court fee subject to waiver, but probably not. Government Code section 68631 states: “An initial fee waiver excuses the applicant from paying fees for the first pleading or other paper, and other court fees and costs, including assessments for court investigations under Section 1513, 1826, or 1851 of the Probate Code.” Assessments under Evidence Code section 730, Family Code section 3111, and rule 5.220 are conspicuously absent.

However, once a veteran has filed Judicial Council Form FW-001, the party may submit Form FW-002 to request additional relief. That form has a box entitled “Fees for court-appointed experts,” which the party may check to ask the court to waive that cost.

## CONFEDERATE MONUMENTS AND BASES

### MONUMENTS

In 2023, the National Ranger Memorial Foundation sued the federal government, contending it should not have removed the name of Colonel John Singleton Mosby from the National Ranger Memorial located at Fort Moore (now Fort Benning) in Georgia. The lawsuit asked a federal court to restore Mosby’s name to two monuments in the memorial.

Throughout 1863, 1864, and until the Civil War ended in 1865, Mosby led a band of 200 to 400 men. Some called them Mosby’s Rangers. The tactics Mosby developed were akin to what is called guerrilla warfare today.

Mosby, a lawyer, and his men masqueraded as Union soldiers and constantly tried to frighten real Union soldiers, approaching Union posts with loud screams. They disrupted Union supply and communications lines. They used hit-and-run tactics and surprise attacks, quickly fading into the countryside where they blended in with the local population to evade capture. Their goal was to distract the Union Army from fighting the war. In a lecture years after the war, Mosby said the object of war is not to kill people but to disable the adversary.

On October 7, 2022, then Secretary of Defense Lloyd J. Austin ordered implementation of the findings of the Naming Commission, established by Congress.<sup>12</sup> The commission’s mission was to provide recommendations for the removal and renaming of all Department of Defense assets that commemorate the Confederate States of America or any person who served voluntarily with the Confederate States of America. The Army removed two items from the National Ranger Memorial at Fort Moore. One was a Ranger Walk paver and the other a Ranger Hall of Fame wall panel. Both items were inscribed with the name of Confederate Colonel John Singleton Mosby.

U.S. District Judge Clay D. Land dismissed the action on December 16, 2024.<sup>13</sup> The court concluded: “Mosby’s ranger tactics and methods may be worthy of admiration and respect in some quarters. But other Americans may genuinely conclude that the development of them as an officer of the Confederate States of America in an open rebellion against the United States adds a treasonous taint that overcomes the appropriateness of any tribute to the effectiveness of some specific maneuver or survival technique. It is beyond reasonable dispute that the United States Congress, consisting of the duly elected representatives of the American people, has the authority to decide whether Mosby should be memorialized and honored on a United States military installation. Congress has determined that he should not be, and the Court finds that its determination was properly implemented by the Secretary of Defense.”<sup>14</sup>

The United States Military Academy (West Point) was the site of a different commemoration debate when the portrait of Confederate States General-in-Chief, Robert E. Lee, was removed in 2022. Lee was a slave owner who considered himself a paternalistic master, despite various accounts of Lee personally whipping a slave. Lee’s portrait was recently rehung at West Point.

## MILITARY BASES

Fort Benning in Georgia was originally named after Henry Lewis Benning, a former Confederate general who had walked out of the Democratic National Convention in 1860 when the party refused a plank supporting slavery. It was renamed Fort Moore after a hero of the Vietnam War, General Hal Moore. The name also commemorated the work of Julia Moore, General Moore's wife. At the time of the first major battle of the Vietnam War, the Battle of Ia Drang Valley, the Army had not yet set up an adequate system of notifying the next of kin of battlefield fatalities. Telegrams were given to taxicab drivers for delivery. Julia Moore took it upon herself to accompany the cab drivers who delivered the telegrams and assisted in the death notifications, grieving with the widows and families of men killed in battle. Fort Moore was recently renamed Fort Benning, after Corporal Fred G. Benning, a World War I Distinguished Service Cross recipient.

Fort Hood, in Texas, was originally named after Confederate General John Bell Hood, who was quoted as saying: "Better die a thousand deaths than submit to live under you or your Government and your Negro allies." It was renamed Fort Cavazos after Medal of Honor recipient four-star General Richard Cavazos, the Army's first Hispanic General and one of the Army's most decorated soldiers. Fort Cavazos was recently renamed Fort Hood after Colonel Robert B. Hood, a decorated officer who served in both World War I and World War II.

Fort Lee, in Virginia, was originally named after Confederate General Robert E. Lee. It was renamed Fort Gregg-Adams after Lieutenant General Arthur J. Gregg and Lieutenant Colonel Charity Adams, who both endured racial discrimination in a segregated military while achieving incredible logistical and administrative successes. It was recently renamed Fort Lee after Private Fitz Lee, a Buffalo Soldier and Medal of Honor recipient who served in the Spanish-American War in Cuba.

Fort A.P. Hill, in Virginia, was originally named after Ambrose Powell Hill, who served as a Confederate

general during the Civil War. His father and uncle were slave owners. It was renamed Fort Walker after Medal of Honor recipient Dr. Mary Edwards Walker, the first female surgeon hired by the U.S. Army. It was renamed Fort Anderson-Pinn-Hill, still commonly referred to as Fort A.P. Hill, after three soldiers who fought in the Union Army during the Civil War named Anderson, Pinn, and Hill.

Fort Pickett, in Virginia, was named after Confederate General George E. Pickett. He was accused of war crimes committed during the Civil War for executing 22 Union prisoners in 1864. It was renamed Fort Barfoot after Van Thomas Barfoot, a Choctaw Indian soldier who was awarded the Medal of Honor. The base was recently renamed Fort Pickett after First Lieutenant Vernon W. Pickett for his heroism during World War II.

Fort Polk, in Louisiana, was named after General Leonidas Polk, a slaveholder who was a corps commander in the Confederate Army. It was renamed Fort Johnson after Medal of Honor recipient Sergeant William Henry Johnson. The base's recent renaming to Fort Polk was in honor of General James H. Polk, a Silver Star recipient from World War II.

Fort Rucker, in Alabama, was named after Confederate General Edmund W. Rucker. The title "General" was merely honorary for Rucker, who entered the Civil War as a private. He rose in rank to become an acting brigadier general, but his commission was never confirmed by the Confederate Congress. It was renamed Fort Novosel after Medal of Honor recipient Michael J. Novosel, a Lieutenant Colonel in the Air Force during World War II and the Korean War and a Warrant Officer in the Army in the Vietnam War. It was renamed Fort Rucker after Captain Edward W. Rucker who flew during World War I.

Fort Gordon, in Georgia, was named after slaveholder and Confederate General John Brown Gordon. It was renamed Fort Eisenhower after General of the Army and 34th President of the United States, Dwight D. Eisenhower. During World

War II, Eisenhower served as Supreme Commander of the Allied Expeditionary Force in Europe, and achieved the five-star rank of General of the Army. He planned and supervised the invasion of North Africa in Operation Torch in 1942–1943 and the invasion of Normandy (D-Day) from the Western Front in 1944–1945. It was recently renamed Fort Gordon in honor of Master Sergeant Gary I. Gordon for his valor during the 1993 Battle of Mogadishu, Somalia.

Fort Bragg, in North Carolina, was originally named after slave owner and Confederate General Braxton Bragg. It was renamed Fort Liberty to commemorate the American value of liberty. It was recently renamed Fort Bragg after Private First Class Roland L. Bragg who fought in the Battle of the Bulge during World War II.

## DEPORTED VETERANS

On September 2, 2025, 61 members of both houses of Congress wrote a letter to Secretary of Homeland Security Kristi Noem and others.<sup>15</sup>

The letter begins: “We write regarding disturbing reports that non-citizen service members and military family members—who have long received protections from detention and deportation in recognition of their sacrifice—are now being referred for removal proceedings under recent policy changes.”<sup>16</sup> That first sentence has a footnote stating one Marine Corps veteran’s wife was detained by ICE while still breastfeeding their baby.<sup>17</sup>

The letter ends with a list of questions about the deportation of military service members, veterans, and their families.<sup>18</sup> It is unknown whether the Secretary ever answered the questions. In a subsequent December 2025 hearing before the House Committee on Homeland Security, Noem was again questioned about the treatment of non-citizen veterans and their families, including the case of Sae Joon Park, a Purple Heart-decorated Army veteran who departed the United States pursuant to a final order of removal and now lives in South Korea.<sup>19</sup>

Meanwhile, in the House of Representatives, Representative Mark Takano (D-California) held a round table to discuss veterans in the justice system on October 16, 2025.<sup>20</sup>

At the roundtable, Senator Richard Blumenthal (D-Connecticut) said about veterans: “I have been learning about immigrants who have served our country, and are being rounded up. Obviously, there are a lot of abuses ongoing in the arrests that are being made of immigrants, but these are immigrants who may not be citizens but who have served our nation and we need to provide for their legal rights.”<sup>21</sup>

Representative Delia Ramirez (D-Illinois) said: “People who have worn the cloth of this nation, who fought and defended this nation are now victims of deportation. We don’t talk about deported veterans enough. And yet we know there are about 100,000 veterans right now here in the United States who do not have United States citizenship and are at risk for deportation.”<sup>22</sup>

## FEDERAL LAW

The U.S. Supreme Court, in *Soto v. United States*,<sup>23</sup> held that a class action brought by disabled veterans may proceed in court. Plaintiff served honorably in the U.S. Marine Corps from 2000 to 2006. During the first of his two tours of duty in Operation Iraqi Freedom, Soto served in Mortuary Affairs. In that role, Soto was assigned to search for, recover, and process the remains of war casualties. He struggled to adjust to civilian life following deployment and eventually received a PTSD diagnosis, which his physicians attributed to his combat experiences, finding him 100 percent disabled. He later sought combat-related special compensation, which the Secretary of the Navy approved, but only for six years. Plaintiff filed a class action against the government. The district court granted summary judgment for the class and the Federal Circuit reversed. Reversing the Federal Circuit’s decision, the U.S. Supreme Court held: “Title 31 U.S.C. § 3702, known as the Barring Act, establishes a default settlement regime for certain claims

brought against the Government. The Barring Act subjects most claims to a 6-year limitations period. § 3702(b)(1). But, the Act includes an exception: If ‘another law’ confers authority to settle a claim against the Government, then that law displaces the Barring Act’s settlement mechanism—including its limitations period—as to that claim. § 3702(a). The question before us is whether a law providing ‘[c]ombat-related special compensation’ (CRSC) to qualifying veterans confers authority to settle CRSC claims. 10 U.S.C. § 1413a. We hold that it does, and thus that the settlement procedures and limitations established under the Barring Act do not apply to claims for CRSC payments.”<sup>24</sup>

The U.S. Supreme Court analyzed the standard of proof used by the Department of Veterans Affairs<sup>25</sup> in *Bufkin v. Collins*.<sup>26</sup> Plaintiffs were veterans who applied for service-connected PTSD disability benefits and were dissatisfied with the resolution of their claims. When evaluating a veteran’s claim for service-related disability benefits, the VA applies a unique standard of proof known as the “benefit-of-the-doubt rule,” which requires the VA to give the benefit of the doubt to the veteran whenever there is an approximate balance of positive and negative evidence on any issue material to the claim. When the case reached the U.S. Supreme Court, the high court described the issue before it: “The question before us is what the Veterans Court must do to comply with that statutory command.” The Supreme Court held: “We hold that the Veterans Court must review the VA’s application of the rule the same way it would any other determination—by reviewing legal issues de novo and factual issues for clear error. And, we hold that the VA’s determination that the evidence is in approximate balance is a predominantly factual determination reviewed only for clear error.”<sup>27</sup>

In *Feliciano v. Department of Transportation*,<sup>28</sup> the U.S. Supreme Court examined the amount of pay a reservist should receive when ordered to active duty. Plaintiff was a federal civilian employee working as an air traffic controller. In July 2012, the Coast Guard ordered him to active-duty service and, for the most part, he remained on active

duty until February 2017. When the military calls reservists to active duty, it often pays them less than they earn in their civilian jobs. Seeking to address that gap, Congress some years ago adopted a “differential pay” statute. That law requires the government to make up the difference between a federal civilian employee’s military and civilian pay in various circumstances, including when he is called to active duty “during a national emergency.”<sup>29</sup> The government refused to give plaintiff that differential pay. The U.S. Supreme Court clarified the issue in this case: “At its core, the dispute before us turns on the meaning of the phrase ‘during a national emergency.’ Does that language promise differential pay to certain federal civilian employees called to active-duty service while a national emergency is ongoing, as Mr. Feliciano argues? Or does it require a reservist to prove some additional, substantive connection between his service and a particular national emergency, as the Federal Circuit held and the government contends? Several considerations persuade us that Mr. Feliciano’s interpretation is the sounder one. [¶] . . . [¶] . . . A federal civilian employee called to active duty pursuant to ‘any other provision of law . . . during a national emergency’ is entitled to differential pay without having to prove that his service was substantively connected in some particular way to some particular emergency.”<sup>30</sup>

In *Asuncion v. United States Secretary of Defense*,<sup>31</sup> the plaintiff worked as a civilian for a federal agency for 30 years. He alleged in his complaint that he developed PTSD during his deployment in Iraq as a member of the National Guard. He alleged that his PTSD, among other impairments, made it difficult and burdensome to complete his work tasks without a reasonable accommodation, and that he is a handicapped person within the meaning of the Rehabilitation Act.<sup>32</sup> The district court concluded plaintiff’s claims were time-barred and entered judgment against him, concluding the claim had to be filed within 90 days of receipt of the final agency decision. Applying equitable tolling, the Ninth Circuit reversed.

*Bussey v. Driscoll* dealt with discharge upgrades.<sup>33</sup> Plaintiff was in the Army in 2008. His commanders

viewed him as an “extraordinary” soldier, who would “run through a brick wall for” his platoon. In 2009, he was deployed to Afghanistan, where he was extensively involved in combat and witnessed severe human suffering. After returning from his deployment, he suffered from then-undiagnosed PTSD. His drinking increased, and although he had no prior history of wrongdoing, he was cited by military police for larceny, assault while under the influence of alcohol, and possession of drug paraphernalia. After months of deteriorating, he was accused by a married civilian woman of sexual assault. Following a night of dancing, the two went to plaintiff’s barracks. After she declined his request to “cuddle,” she said he picked her up, took her to the bed, and began removing her clothing. She said she repeatedly told him to stop and that she did not want to have sex with him, but he forcibly held her down and penetrated her.

Plaintiff was charged under the Uniform Code of Military Justice with rape, adultery, aggravated sexual assault, and wrongful sexual contact. A court-martial panel returned a guilty verdict for wrongful sexual contact and adultery, and a not guilty verdict for rape and aggravated sexual assault. He was sentenced to six months of confinement, required to register as a sex offender, and received a dishonorable discharge, which was later modified to a bad conduct discharge. Following his confinement and discharge, plaintiff endured debilitating symptoms of PTSD, including anxiety, depression, suicidal and homicidal ideation, and severe agitation and reactivity. He was later paralyzed by a high-speed motorcycle accident and permanently required a wheelchair. At times homeless, he lived out of his truck and bathed in a river. He thereafter petitioned the Army Board for Correction of Military Records to upgrade his discharge to honorable so he could obtain education and medical benefits through the VA. The Army opposed the upgrade, and the board denied the petition.

Plaintiff sought review in federal court, which court granted summary judgment in favor of the Army. Reversing and remanding, the Ninth Circuit stated: “The Board failed to consider the full aperture of

‘circumstances resulting in’ Bussey’s ‘discharge,’ and failed to give ‘liberal consideration’ to Bussey’s claim that his PTSD ‘contributed to’ those circumstances. 10 U.S.C. § 1552(h)(2)(B). We vacate the district court’s judgment and remand this case to the Board to reconsider Bussey’s upgrade request under the appropriate standard.”<sup>34</sup>

## PSYCHEDELICS FOR TREATMENT OF PTSD

There is growing evidence and vocal support from veterans and others pushing to advance research and access to psychedelics like MDMA, psilocybin, and ibogaine as promising, though still illegal, treatments for PTSD.

After President Richard Nixon declared a war on drugs, Congress enacted the Controlled Substances Act in 1970.<sup>35</sup> The CSA prohibits many hallucinogens/psychedelics in the United States. California law also criminalizes these drugs via the California Uniform Controlled Substances Act, enacted in 1972.<sup>36</sup>

Both the federal and California acts outline the procedure for identifying substances for control and assigning them into one of five categories based on the substance’s medical use, abuse potential, and safety or dependence liability. Substances without an approved medical use are Schedule I controlled substances, and substances with accepted medical uses are Schedules II-V. Because Schedule I drugs, including hallucinogens and psychedelics, are considered to have a high potential for abuse, most researchers stopped investigating their therapeutic potential decades ago.

Articles about the use of psychedelics to treat PTSD caution that hallucinogens/psychedelics must be administered in conjunction with psychotherapy and should not be taken without such therapy. The experienced therapist can create and focus on a sense of safety for the patient while mind-altering drugs are administered. It is thought that it’s not the hallucinogen/psychedelic that relieves the PTSD symptoms, but the psychotherapy, which is enhanced and improved with the use of the drug.

Members of Congress Lou Correa (D-California) and Jack Bergman (R-Michigan) introduced the Innovative Therapies Centers of Excellence Act of 2025.<sup>37</sup> H.R. 2623, if enacted, would increase federally funded research on PTSD, substance use disorder and depression.

In October 2025, Governor Newsom signed Assembly Bill 1103.<sup>38</sup> It encourages research of psychedelics in California. Effective January 1, 2026, Health and Safety Code section 11480, subdivision (a) has been amended to state: “The Legislature finds that there is a need to encourage further research into the nature and effects of cannabis and hallucinogenic drugs and to coordinate research efforts on such subjects.”<sup>39</sup>

## TRANSGENDER TROOPS

On January 20, 2025, President Donald Trump issued Executive Order 14168. That EO stated: “It is the policy of the United States to recognize two sexes, male and female. These sexes are not changeable and are grounded in fundamental and incontrovertible reality. . . . [W]hen administering or enforcing sex-based distinctions, every agency and all Federal employees acting in an official capacity on behalf of their agency shall use the term ‘sex’ and not ‘gender’ in all applicable Federal policies and documents.”

The President then issued Executive Order 14183 on January 27, 2025. It includes these words: “[T]he Armed Forces have been afflicted with radical gender ideology to appease activists unconcerned with the requirements of military service like physical and mental health, selflessness, and unit cohesion. . . . The Armed Forces must adhere to high mental and physical health standards to ensure our military can deploy, fight, and win, including in austere conditions and without the benefit of routine medical treatment or special provisions. . . . Beyond the hormonal and surgical medical interventions involved, adoption of a gender identity inconsistent with an individual’s sex conflicts with a soldier’s commitment to an honorable, truthful, and disciplined lifestyle, even in one’s personal

life. A man’s assertion that he is a woman, and his requirement that others honor this falsehood, is not consistent with the humility and selflessness required of a service member.”

Secretary of Defense Pete Hegseth issued a memo on February 7, 2025, stating: “Effective immediately, all new accessions for individuals with a history of gender dysphoria are paused, and all unscheduled, scheduled or planned medical procedures associated with affirming or facilitating a gender transition for Service members are paused.” Then, on February 26, 2025, the Department of Defense (now known as the Department of War) issued a memo implementing Trump’s executive orders eliminating transgender troops from the military.

On January 28, 2025, *Talbott v. Trump* (later captioned *Talbott v. United States*) was filed in federal court in the District of Columbia by several transgender service members and prospective service members.<sup>40</sup> In the complaint, plaintiffs contended Trump’s EO banning transgender people from serving in the military violates the equal protection clause of the Fifth Amendment and is discriminatory. In their pleadings, plaintiffs alleged the categorical exclusion of transgender people from military service was not based on any legitimate governmental purpose and was issued without any study of the effectiveness of transgender service members and without any assessment of whether their service entailed greater costs. The district court granted a preliminary injunction on March 18<sup>41</sup> and denied the government’s request to dissolve it on March 26.<sup>42</sup> The order preliminarily enjoined defendants from implementing EO 14183. The U.S. Court of Appeals for the District of Columbia initially granted an administrative stay and, on December 9, 2025, stayed the preliminary injunction pending the government’s appeal.<sup>43</sup>

*Shilling v. United States* was filed in federal court in Seattle on February 6, 2025.<sup>44</sup> The plaintiffs are openly transgender persons who have served in the military and, like *Talbott*, claimed that the transgender military ban violates the equal protection clause of the Fifth Amendment and is

discriminatory. On March 27, 2025, the U.S. District Court for the Western District of Washington issued a nationwide preliminary injunction blocking implementation of the transgender military ban. On April 18, 2025, the Ninth Circuit denied the government's petition to stay the injunction, stating the government did not demonstrate irreparable harm absent a stay.<sup>45</sup> But on May 6, 2025, the U.S. Supreme Court stayed the *Shilling* injunction, pending disposition of the matter in the Ninth Circuit and disposition of a petition for a writ of certiorari, if such a writ is timely sought.<sup>46</sup>

*Ireland v. Hegseth* was filed on March 17, 2025,<sup>47</sup> in the U.S. District Court for the District of New Jersey by two openly transgender U.S. Air Force service members who sought to remain in service until retirement. As in the other two actions, they alleged the transgender ban violates the equal protection clause of the Fifth Amendment. On March 24, 2025, the court issued a temporary restraining order: "Defendants . . . are hereby fully enjoined from initiating administrative separation proceedings against Plaintiffs based on their transgender status and are further enjoined from enforcing or implementing any aspect of the Orders as to Plaintiffs."<sup>48</sup>

On May 8, 2025, Secretary Hegseth issued a memo regarding transgender troops. It included these words: "Service members who have a current diagnosis or history of, or exhibit symptoms consistent with, gender dysphoria may elect to separate voluntarily; such Service members may also be eligible for voluntary separation pay. The eligibility window to self-identify for voluntary separation is extended to June 6, 2025, for Active Component Service members and July 7, 2025, for Reserve Component Service members. Additionally, the Military Departments will immediately begin processing for separation Service members who previously self-identified for voluntary separation prior to March 26, 2025."<sup>49</sup>

On July 29, 2025, Military.com reported that transgender troops described their process of leaving the military as full of indignities. Some

said support from leadership evaporated. Others described being denied the ability to wear a uniform at retirement.

## WOMEN IN THE MILITARY

Throughout 2025, many women military leaders were fired or otherwise relieved of their duties, including:

- The first woman chief of a branch of military service, Commandant of the Coast Guard, Admiral Linda Fagan
- Commander of the 613th Air Operations Center, Colonel Julie Sposito-Salceies
- Senior Military Assistant to the Secretary of Defense, Lieutenant General Jennifer Short
- Chief of Naval Operations who was the first woman member of the Joint Chiefs of Staff, Admiral Lisa Franchetti
- The head of the Defense Health Agency, Lieutenant General Telita Crosland
- Space Force Commander in Greenland, Colonel Susannah Meyers
- United States military representative to the NATO Military Committee, Vice Admiral Shoshana Chatfield
- Garrison Commander of Fort McCoy, Wisconsin, Colonel Sheyla Baez Ramirez
- The first woman to lead the U.S. Naval Academy, Vice Admiral Yvette Gonzalez Davids
- Naval Reserve Chief, Vice Admiral Nancy Lacore
- Air Force Acting Judge Advocate General, Major General Rebecca Vernon
- Navy Director of Medical Services at Expeditionary Medical Facility Bravo, Commander Janelle Marra

It's unknown why so many women leaders in the military have been sacked recently. Several news sources have made statements about the situation.

The Hill reported: "All women have now been purged from the military's top jobs, with no female four-

star officers on active duty and none in pending appointments for four- or three-star roles.”<sup>50</sup>

The Atlantic published an article titled: “The Administration Wants Military Women to Know Their Place.”<sup>51</sup>

The Military Times quoted a former Sergeant Major of the Army: “We’re hurting the wrong people. What is the metric that’s even being used? They haven’t been negligent in their duties.”<sup>52</sup>

The Hill wrote: “Hegseth’s ousting of female leaders may have a ‘chilling effect’ at Pentagon.” And it quoted Hegseth: “The single dumbest phrase in military history is ‘our diversity is our strength.’” The article also says that commemorations and celebrations of Women’s History Month have been ended by the Pentagon.<sup>53</sup>

At Secretary Hegseth’s gathering of military leaders last September 30, he said: “When it comes to any job that requires physical power to perform in combat, those physical standards must be high and gender neutral. . . . If women can make it, excellent. If not, it is what it is. If that means no women qualify for some combat jobs, so be it.”<sup>54</sup>

The story that women have been given an easier time than men in the military may contain some amount of lore. Last October 5, retired General Peter Chiarelli said on ABC: “When the Army opened up the Ranger program [to women], the standards changed not at all.”<sup>55</sup> On the same program was a woman who was in the first class at West Point that accepted women. She talked about the women students’ experiences, noting an occasion when a woman student smartly saluted a superior officer, saying “[G]ood morning, sir,” only to hear back: “It was a good morning until you bitches got here.”<sup>56</sup>

## HOMELESS VETERANS WIN!

In *Powers v. McDonough*, plaintiffs, who are homeless and disabled military veterans, sought to return the West Los Angeles VA Grounds to its intended use:

housing disabled veterans.<sup>57</sup> After a four-week bench trial, the district court ruled in plaintiffs’ favor and found that the land-use leases the VA had with the Regents of the University of California, Los Angeles, Brentwood School, and Bridgeland Resources, LLC were unlawful. The lower court voided these leases and enjoined the VA from renegotiating them. The district court also ordered the VA to build supportive housing for veterans on the West Los Angeles VA Grounds. Affirming in part and denying in part, the Ninth Circuit stated: “[W]e affirm the district court’s grant of class certification . . .”; “the harm caused to Plaintiffs will be remedied by voiding the lease unless and until the VA can demonstrate that it is compliant with the Leasing Act”; “members of Plaintiffs’ putative class are denied meaningful access to necessary healthcare services and placed at serious risk of institutionalization.”<sup>58</sup>

## ENDNOTES

\* **Justice Eileen C. Moore** was appointed to the Superior Court of California in 1989 and to the California Court of Appeal in 2000.

She is the author of two books: *Race Results* compares the treatment of African Americans by the U.S. Supreme Court and in Hollywood movies; *Gender Results* compares the treatment of gender issues by the U.S. Supreme Court and in Hollywood movies.

In 2011, Justice Moore developed Litigation Update and has written daily summaries of legal opinions ever since. They are sent to members of the Litigation Section every month.

Justice Moore spent her nonjudicial legal career in private practice in Newport Beach. Prior to becoming a lawyer, she practiced as a registered nurse, including service as a combat nurse in Vietnam while serving in the Army Nurse Corps. She is a life member of Vietnam Veterans of America.

In addition to her judicial position, Justice Moore has spent decades in support of veterans, particularly those who interact with the courts and the justice system. In 2008, she founded and still chairs the Judicial Council’s Veterans and Military Families Committee. For the past eight years, she has authored monthly articles about veterans that are published in California’s leading legal newspaper with the goal of educating judges and lawyers about issues concerning veterans.

Justice Moore has been presented with many awards and honors by courts, legal organizations and civic and educational groups, including the California Judges Association's Humanitarian Award in 2019. In 2020, the California Department of Veterans Affairs, CalVet, presented Justice Moore with its trailblazer award, and in 2021, the United States Department of Veterans Affairs, the VA, presented her with its trailblazer award. In 2022, the Daughters of the American Revolution also honored her. In 2023, Justice For Vets, part of ALL RISE, presented her with its Hall of Fame Award.

Justice Moore is on the Veterans Justice Commission, headed by two former Secretaries of Defense, Chuck Hagel and Leon Panetta. The Commission has only 15 members nationwide and makes reports directly to Congress. It works toward improving the transition of military service members into civilian life in ways that avoid involvement with the criminal justice system.

1. (PTSD).
2. Codified in Senate Bill No. 54 (2025–2026 Reg. Sess.).
3. (CLRA).
4. Senate Bill No. 694 (2025–2026 Reg. Sess.).
5. See *Wade v. Superior Court* (2019) 33 Cal.App.5th 694.
6. (2025) 114 Cal.App.5th 476.
7. *Id.* at p. 488.
8. (2025) 113 Cal.App.5th 1242 (*Segura*).
9. *Id.* at p. 1249 (quoting, with italics added, Pen. Code, § 1001.80, subds. (b)(2)(A) & (c)(2)(A))(citation omitted).
10. (2025) 113 Cal.App.5th 587.
11. *Id.* at pp. 597–598 (citations omitted).
12. Pub. Law 116-283.
13. *Nat. Ranger Memorial Foundation, Inc. v. U.S. Dept. of Defense* (M.D.Ga, Dec. 16, 2024, Case No. 4:23-cv-170 (CDL))2024 WL 5126279.
14. *Id.* at p. \*9.
15. Letter from Lawmakers to DHS, DOD on Deportations of Military Families (Sept. 2, 2025), <[https://www.warren.senate.gov/imo/media/doc/letter\\_from\\_lawmakers\\_to\\_dhs\\_dod\\_on\\_deportations\\_of\\_military\\_families.pdf](https://www.warren.senate.gov/imo/media/doc/letter_from_lawmakers_to_dhs_dod_on_deportations_of_military_families.pdf)>.
16. *Id.* at p. 1.
17. *Id.* at p. 1, fn. 1.
18. *Id.* at pp. 6–7.
19. Worldwide Threats to the Homeland, Hearings before House Com. on Homeland Security, 119th Cong., 1st Sess. (2025).
20. House Com. on Veterans' Affairs—Democrats, Justice for Veterans: Is the Legal System Serving Our Veterans Well? (Oct. 16, 2025) <<https://democrats-veterans.house.gov/events/hearings/justice-for-veterans-is-the-legal-system-serving-our-veterans-well>>.
21. *Ibid.*
22. *Ibid.*
23. (2025) 605 U.S. 360.
24. *Id.* at p. 362.
25. (VA).
26. (2025) 604 U.S. 369.
27. *Id.* at p. 372.
28. (2025) 605 U.S. 38 (*Feliciano*).
29. 5 U.S.C. § 5538(a) and 10 U.S.C. § 101(a)(13)(B).
30. *Feliciano, supra*, at pp. 44, 55–56.
31. (9th Cir. 2025) 150 F.4th 1252.
32. 29 U.S.C. § 701 et seq.
33. (9th Cir. 2025) 131 F.4th 756.
34. *Id.* at p. 764.
35. 21 U.S.C. § 801 et seq. (CSA).
36. Health & Saf. Code, § 11000 et seq.
37. H.R. 2623, 119th Cong, 1st Sess. (2025).
38. Assem. Bill No. 1103 (2025–2026 Reg. Sess.).
39. As amended by Stats. 2025, c. 571, § 4.
40. (D.D.C. 2025, Civ. A. No. 25-cv-00240) (*Talbot*).
41. *Talbot* (D.D.C. 2025) 775 F.Supp.3d 283.
42. *Talbot* (D.D.C. 2025) 775 F.Supp.3d 445.
43. *Talbot v. United States* (D.C. Cir., Dec. 9, 2025, No. 25-5087) 2025 WL 3533344.
44. (W.D.Wash. 2025) 773 F.Supp.3d 1069 (*Shilling*).
45. *Shilling v. Trump* (9th Cir., Apr. 18, 2025, No. 25-2039) 2025 WL 1145052.
46. *United States v. Shilling* (2025) 145 S.Ct. 2695 (Mem.).
47. (D.N.J. 2025) 772 F.Supp.3d 560.
48. *Id.* at p. 567.
49. U.S. Dept. Defense, Implementing Policy on Prioritizing Military Excellence and Readiness (May 8, 2025) <<https://media.defense.gov/2025/May/08/2003706668/-1/-1/1/IMPLEMENTING-POLICY-ON-PRIORITIZING-MILITARY-EXCELLENCE-AND-READINESS.PDF>>.
50. Mitchell, *Hegseth's Ousting of Female Leaders May Have 'Chilling Effect' at Pentagon*, The Hill (Jul. 26, 2025)

<<https://thehill.com/policy/defense/5421346-pentagon-reassigns-women-leadership/>>.

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52. Wu, *DOD Leadership Firings Spark Concerns Over Support for Female Officers*, *Military Times* (Mar. 17, 2025) <<https://www.militarytimes.com/news/your-military/2025/03/17/dod-leadership-firings-spark-concerns-over-support-for-female-officers/#:~:text=The%20firings%20have%20also%20drawn,been%20negligent%20in%20their%20duties.%E2%80%9D>>.
53. Mitchell, *supra*.
54. Pete Hegseth, U.S. Secretary of Defense, address to General and Flag Officers at Quantico, Virginia (Sept. 30, 2025), transcribed at <<https://www.war.gov/News/Transcripts/Transcript/Article/4318689/secretary-of-war-pete-hegseth-addresses-general-and-flag-officers-at-quantico-v/>>.
55. *This Week with George Stephanopoulos* (interview with Gen. Peter Chiarelli, former Army Vice Chief of Staff, et al.) ABC News (Oct. 5, 2025).
56. *Ibid*.
57. (9th Cir. 2025) 163 F.4th 1162.
58. *Id.* at pp. 1197–1198.





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